



March 10, 2006

Via ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 -- MB Docket No. 05-317

Dear Ms. Dortch,

This letter responds to a filing made by Scripps Howard Broadcasting Company ("Scripps Howard") on March 6, 2006.¹ Scripps Howard argues that EchoStar's prior filing in this docket was an unauthorized *ex parte* filing. EchoStar's Opposition cannot be considered an unauthorized *ex parte* filing, however, because EchoStar fully conformed to the filing instructions and deadlines set forth by the Commission in the Public Notice for waivers of digital testing under the Satellite Home Viewer Extension and Reauthorization Act of 2004.² Specifically, the Commission provided that a party affected by a waiver request may file an opposition by December 30, 2005. Further, the Commission provided that Oppositions "should be filed electronically using the [Electronic Comment Filing System] and reference MB Docket No. 05-317 and the call sign of the station requesting the waiver." EchoStar followed these directions when it filed the EchoStar Opposition and, thus, its filing is not a prohibited *ex parte* filing.

¹ See Objection to Commission Consideration of the "Opposition of EchoStar Satellite, LLC" and Contingent Consolidated Reply of Scripps Howard Broadcasting Company (March 6, 2006).

² See DA 05-2979 (November 17, 2005). EchoStar has withdrawn its opposition with respect to the following stations: WNBC-DT, WJAR-DT, and KTRK-DT.

Because EchoStar's original method of filing these documents comported with the filing instructions outlined by the Commission, it cannot reasonably have caused prejudice to any broadcaster. The Commission's Public Notice clearly established when and where oppositions to waiver requests were to be filed, so there was no reason for any broadcaster to be taken by surprise. Other television stations had no difficulty locating the EchoStar Opposition and filing timely replies to it.³ Indeed, the EchoStar Opposition was covered by the trade press,⁴ making any prejudice even more unlikely. Finally, as to the February 17, letter because the public notice could not have forewarned broadcasters about such a filing, EchoStar took the additional step of serving the four broadcasters addressed in the letter, and sending courtesy copies to all of the other thirty broadcasters in the EchoStar Opposition. Scripps Howard's counsel even admits to having received a copy of EchoStar's filing from EchoStar through the mail.

It is also worth noting that most of the broadcasters also followed the instructions in the Public Notice when preparing their replies to the EchoStar Opposition and filed the replies in the Electronic Comment Filing System without including a certificate of service showing that they served EchoStar.⁵ Nevertheless, out of an abundance of caution, EchoStar is serving the EchoStar Opposition, the letter filed by EchoStar in this proceeding on February 17, and this letter to all stations whose waiver requests were challenged in the EchoStar Opposition. In addition, one copy of this letter and the attachment is being filed in this docket via the Commission's Electronic Comment Filing System.

Under the circumstances, EchoStar is not opposed to the Commission considering the Scripps Howard late-filed pleading. EchoStar further requests that the Commission consider this filing, which is being formally served on all relevant parties.

³ See *infra* at Footnote 5.

⁴ See, e.g., *DBS, Broadcaster Square Off On DTV Tests; FCC Sees Action Soon*, Communication Daily, Jan. 11, 2006.

⁵ See, e.g., Multimedia Holdings Corporation, Reply to EchoStar Objection of KUSA's 339(a)(2)(D)(vii) Waiver Request (January 12, 2006), Independence Television Company, Reply Comments of Independence Television Company (January 16, 2006); KVOA Communications, Inc., Reply Comments of KVOA Communications, Inc. (January 16, 2006); Sangre de Cristo Communications, Inc., Reply Comments of Sangre De Cristo Communications, Inc. (January 16, 2006); KTRK Television, Inc., Response to Opposition of EchoStar Satellite L.L.C. Television Station Section 339(a)(2)(D)(vii) Waiver Request (January 16, 2006); and WTVH License, Inc., Response to Opposition of EchoStar Satellite L.L.C. Television Station Section 339(a)(2)(D)(vii) Waiver Request (January 16, 2006).

Respectfully submitted,

/s/

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Attachments (EchoStar Opposition, EchoStar Letter filed 2/17/06, and Certificate of Service)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Waiver of Digital Testing Pursuant to the
Satellite Home Viewer Extension and
Reauthorization Act of 2004

MB Docket No. 05-317

OPPOSITION OF ECHOSTAR SATELLITE L.L.C.

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December 30, 2005

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**Before the
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In the Matter of:

Waiver of Digital Testing Pursuant to the
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Reauthorization Act of 2004

MB Docket No. 05-317

OPPOSITION OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. hereby files its opposition to 36 of the 61 requests for waiver of digital signal testing filed by network stations pursuant to Section 339(a)(2)(D)(viii) of the Communications Act of 1934, 47 U.S.C. § 339(a)(2)(D)(viii) (as amended by Section 204 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”)).¹ The waiver requests filed by broadcasters rely on various grounds, including the need for international coordination, zoning impediments, force majeure and the use of side-mounted antennas. EchoStar is opposing a subset of the waiver requests on the basis that the broadcasters failed to meet the “clear and convincing evidence” standard set forth in the statute by the November 30, 2005 statutory deadline. Congress intentionally adopted a very high standard and a strict time frame, because each waiver that is granted by the Commission will prevent subscribers from receiving a digital signal – a result that is contrary to the public interest. The Commission is therefore compelled by statute to deny these waiver requests.

¹ Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 204, 118 Stat. 3394, 3408 (2004) (“SHVERA”).

I. INTRODUCTION AND SUMMARY

When Congress set forth the waiver process in SHVERA,² it balanced preservation of the network system of territorial monopolies against the public interest benefit of providing a digital signal to consumers as soon as practicable. If legitimate obstacles beyond the control of broadcasters prevent them from deploying a digital signal, then a waiver is justified. But the standard is high. The evidence must be clear. And it must be submitted to the Commission in a timely manner. To the extent that subscribers cannot receive digital signals from their local network station, EchoStar would like the opportunity to provide subscribers with digital service. Enabling subscribers to receive digital service promotes the digital television (“DTV”) transition and, thus, serves the public interest.

Specifically, under Section 339(a)(2)(d)(vii) of the Communications Act,³ subscribers may initiate digital signal testing on April 30, 2006 for the top 100 television markets and July 15, 2007 for all remaining markets. If the test shows that a subscriber cannot receive a digital signal from the local broadcaster, then a satellite carrier is permitted to deliver a distant digital signal to the subscriber. A local broadcaster may prevent a subscriber from receiving digital signal strength testing, however, by obtaining a waiver from the Commission. Section 339(a)(2)(d)(viii) provides that the waiver request must contain “clear and convincing evidence” that the requesting network station’s digital signal coverage is limited because of the “unremediable presence” of one or more statutory grounds, namely:

² 47 U.S.C. § 339(a)(2)(D)(vii) and (viii).

³ 47 U.S.C. § 339(a)(2)(D)(vii).

- (I) the need for international coordination or approvals;
- (II) clear zoning or environmental legal impediments;
- (III) force majeure;
- (IV) the station experiences a substantial decrease in its digital signal coverage area due to necessity of using side-mounted antenna;
- (V) substantial technical problems that result in a station experiencing a substantial decrease in its coverage area solely due to actions to avoid interference with emergency response providers; or
- (VI) no satellite carrier is providing the retransmission of the analog signals of local network stations under section 338 [47 U.S.C. § 338] in the local market.

Importantly, Section 339(a)(2)(d)(viii) also provides that: “*Under no circumstances* may such a waiver be based upon financial exigency” (emphasis added).

Clearly, Congress has set a very high bar for these waivers. Congress’s adoption of the “clear and convincing evidence” standard demonstrates an intent to limit waivers to those broadcasters who could not provide full digital service because of circumstances that are beyond their control. Unlike the more common “preponderance of the evidence” standard used in civil court cases, “[c]lear and convincing” evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is ‘highly probable.’”⁴ Under this standard, a broadcaster seeking a waiver may not rely on a simple statement that a particular waiver circumstance exists. It must provide evidence to engender an “abiding conviction” that its assertion is “highly probable.”

Furthermore, the statute requires that waiver request “shall be filed not less than 5 months prior to the implementation deadline”⁵ -- which makes the statutory deadline

⁴ *Price v. Symsek*, 988 F.2d 1187, 1192 (Fed. Cir. 1993); *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (referring to a clear and convincing standard as demonstrating the “truth of the factual contentions [as] ‘highly probable’”).

⁵ 47 U.S.C. § 339(a)(2)(D)(viii).

November 30, 2005. Therefore, to the extent that the broadcasters have not met their statutory burden by now, the Commission is prevented by statute from considering additional factual evidence to support any waiver application. Not only would this violate on its face the statutory deadline, but it would deprive EchoStar of a full opportunity to respond.

Congress' frustration with dilatory broadcasters was reflected in the unambiguous statutory direction that the Commission could only grant a waiver in clearly delineated and narrowly stated circumstances. Indeed, at a time when the electromagnetic spectrum was being allotted by auction, Congress reserved for broadcasters some of the most coveted spectrum free of charge. In return, among other things, the broadcasters agreed to make their digital signals available expeditiously to the U.S. public, which owns that spectrum. Some broadcasters have been prevented from deploying digital signals by circumstances that are beyond their control. The recent Katrina calamity is an example of a narrow situation that justifies a waiver under the statute. EchoStar is not challenging waiver requests from stations affected by circumstances such as Hurricanes Katrina and Rita.⁶ But many broadcasters have not kept their promise to facilitate the digital transition and now, through the waiver process, they want to prevent subscribers from receiving digital signals through an alternative source.

In their filings, some broadcasters paint a picture of impending doom if the Commission were to deny these waivers. But distant digital signals are only permitted

⁶ EchoStar is also not challenging a number of other waiver requests for a variety of reasons. The fact that EchoStar is not opposing these other waiver requests is not an admission that the grounds cited therein are necessarily valid. In addition, EchoStar reserves the right to oppose the extension of any waiver granted as part of this proceeding.

after a subscriber requests and receives a signal-strength test showing that the subscriber cannot receive an adequate over-the-air DTV signal. In addition, consumers are required to purchase the local network station's analog signal by satellite, where available,⁷ in order to receive a digital signal from a distant station affiliated with the same network. And the statutory factors are not the end of the analysis. They are the statutory prerequisite to the Commission's ability to grant a waiver. Even when one of these criteria is satisfied, the law says that the Commission "may" -- not that it "shall" -- grant a waiver. The Commission also needs to satisfy itself that grant of the waiver is in the public interest. In that regard, EchoStar notes that the public interest balance should tip heavily in favor of consumers; erring on the side of granting the waivers to broadcasters would not only run counter to Congress's intent, it would deprive consumers of the option to receive digital network programming to which they would otherwise not have access.

II. OPPOSITIONS TO WAIVER REQUESTS

A. KVOA-DT, Tucson, Arizona

KVOA Communications, Inc. ("KVOA") claims a waiver for KVOA-DT because "the need for international coordination and approval has prevented the Commission from granting the station's application to maximize its digital facilities."⁸

While EchoStar recognizes that unavoidable administrative delay caused by the need to obtain Mexican government approval would be a legitimate ground for waiver,

⁷ The local station for each of the NBC, ABC, CBS and Fox is available on the DISH Network in all of the top 100 markets other than Baton Rouge, Louisiana.

⁸ Letter from Scott S. Patrick, Counsel for KVOA Communications to Marlene H. Dortch, Secretary, FCC, at 2, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005).

KVOA has not met its statutory obligation. KVOA has presented no evidence (much less clear and convincing evidence) to show that its inability to secure the necessary international coordination or approval is or has been “unremediable.”

Even though international coordination takes place between governmental agencies, the pace of such coordination is often determined by how actively the applicant or licensee pursues its application. KVOA has not provided any supporting evidence of the steps it has taken, if any, to facilitate coordination, nor has it shown that it could not have taken any additional steps to either facilitate Mexican approval or to avoid the need for such approval in the 26 months during which its application for minor modification has been pending.

Importantly, KVOA is the only station in the Tucson, Arizona, market that is seeking a waiver on this or any ground. At a bare minimum, the “clear and convincing evidence” standard would appear to require KVOA to explain what individual circumstances kept it from achieving the coordination that all other network stations in the market were able to achieve. Since KVOA did not provide clear and convincing evidence of unremediable delay within the statutorily mandated period, the Commission should decline KVOA’s requested waiver and allow consumers to have access to a distant digital network signal by satellite if they cannot receive a local over-the-air digital over-the-air signal (keeping in mind that the consumer will have to subscribe to the KVOA analog signal by satellite as well).

B. WTIC-TV, Hartford, Connecticut

Tribune Television Company ("TTC") claims a waiver for WTIC-DT "because it has been unable to complete construction of WTIC-DT's maximized facility due to a delay in securing Canadian consent/coordination."⁹

While EchoStar recognizes that unavoidable administrative delay caused by the need to obtain Canadian government approval would be a legitimate ground for waiver, TTC has not met its statutory obligation. TTC has presented no evidence (much less clear and convincing evidence) to show that its inability to secure the necessary international coordination or approval is or has been "unremediable."

Even though international coordination takes place between governmental agencies, the pace of such coordination is often determined by how actively the applicant or licensee pursues its application. TTC has not provided any supporting evidence of the steps it has taken, if any, to facilitate coordination, nor has it shown that it could not have taken any additional steps to either facilitate Canadian approval or to avoid the need for such approval in the 18 months during which its maximization application has been pending.

Importantly, WTIC-DT is the only station in the Hartford-New Haven, Connecticut, market that is having difficulties with international coordination. At a bare minimum, the "clear and convincing evidence" standard would appear to require TTC to

⁹ Letter from Thomas P. Van Wazer, Counsel for Tribune Television Company to Marlene H. Dortch, Secretary, FCC, at 1, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005). While TTC also mentions local zoning problems that ultimately forced WTIC's landlord to abandon plans to construct a new tower, *id.* at 2, this issue appears to have been overcome before TTC filed its maximization application and TTC does appear to claim a waiver on that basis. *Id.* at 2 ("TTC submits it has satisfied one of the waiver criteria specified in SHVERA").

explain what individual circumstances kept WTIC-DT from achieving the coordination that all other network stations in the market were able to achieve. Since TTC did not provide clear and convincing evidence of unremediable delay within the statutorily mandated period, the Commission should decline TTC's requested waiver and allow consumers to have access to distant digital network signals by satellite if they cannot receive a local over-the-air digital signal.

C. WSMH-DT, Flint, Michigan

WSMH Licensee, LLC ("WSMH") claims a waiver for WSMH-DT "because of the necessity to coordinate the station's proposed operations with Canadian stations."¹⁰

While EchoStar recognizes that unavoidable administrative delay caused by the need to obtain Canadian government approval would be a legitimate ground for waiver, WSMH has not met its statutory obligation. WSMH has presented no evidence (and much less clear and convincing evidence) to show that its inability to secure the necessary international coordination or approval is or has been "unremediable."

Even though international coordination takes place between governmental agencies, the pace of such coordination is often determined by how actively the applicant or licensee pursues its application. WSMH has not provided any supporting evidence of steps that it has taken to facilitate coordination, nor has it shown that it could not have taken any additional steps to either facilitate Canadian approval or to avoid the need for such approval in the six years during which its application for a construction permit has been pending.

¹⁰ Letter from Kathryn R. Schmeltzer and Tony Lin, Counsel for WSMH Licensee LLC to Marlene H. Dortch, Secretary, FCC, at 1, *filed in* MB Docket No. 05-317 (filed Nov. 29, 2005).

Importantly, WSMH is the only station in the Flint, Michigan, market that is having difficulties with international coordination. At a bare minimum, the “clear and convincing evidence” standard would require WSMH to explain what individual circumstances kept it from achieving the coordination that all other network stations in the market were able to achieve. Since WSMH did not provide clear and convincing evidence of unremediable delay within the statutorily mandated period, the Commission should decline WSMH’s requested waiver and allow consumers to have access to distant digital network signals by satellite if they cannot receive a local over-the-air digital signal.

D. WTEN-DT, Albany, New York

Young Broadcasting of Albany, Inc. (“Young”) claims a waiver on the basis that “WTEN-DT experienced ‘the need for international coordination or approvals’ that delayed the buildout of WTEN-DT beyond Young’s control.”¹¹ However, as Young admits, Canadian concurrence to WTEN-DT’s full-power facilities was obtained earlier this year and the Commission granted Young a construction permit for its full power facilities in August 2005.¹² Young has offered no explanation why it cannot complete construction of its full power facilities by April 30, 2006 and, indeed, its waiver request suggests that it will be able to do so. Any limitations in WTEN-DT’s digital signal coverage, therefore, are not due to the “unremediable presence” of the need for international coordination or approval, as required by Section 339(a)(2)(D)(viii)(I).

¹¹ Letter from David Kushner and Stephen Hartzell, Counsel to Young Broadcasting of Albany, Inc. to Marlene H. Dortch, Secretary, FCC, at 3, *filed in* MB Docket No. 05-317 (filed Nov. 29, 2005).

¹² *Id.* at 2.

Accordingly, Young's waiver request should be denied and consumers should be allowed access to distant digital network programming by satellite if they cannot receive a local-over-the-air digital signal.

It appears, moreover, that construction of WTEN-DT's full power facilities is well underway and is expected to be completed before April 30, 2006.¹³ Young submits that it is requesting a waiver out of an abundance of caution to protect against "unforeseen circumstances"¹⁴ that might cause the expected installation date to slip. Clearly, an "abundance of caution" is not clear and convincing evidence of the need for a digital testing waiver, and the DTV transition would be better served by denying the waiver. This would ensure that Young remains motivated to timely construct its full power facilities. Further, it is important to keep in mind that consumers would still be required to purchase the station's analog signal from the satellite carrier and that as soon as Young makes its digital signal available in an area, no new consumers will be permitted to subscribe to the distant digital network signal.

E. WNYO-DT, Buffalo, New York

New York Television, Inc. ("NYT") claims a waiver for WNYO-DT "because . . . the licensee is awaiting international approval from Canada for WNYO's proposed digital facilities."¹⁵

¹³ *Id.* at 3 ("Young anticipates that it will be able to commence full-power operations prior to April 30, 2006 . . .").

¹⁴ *Id.* at 3.

¹⁵ Letter from Kathryn R. Schmeltzer and Paul A Cicleski, Counsel for New York Television, Inc. to Marlene H. Dortch, Secretary, FCC, at 1 (filed Nov. 29, 2005).

While EchoStar recognizes that unavoidable administrative delay caused by the need to obtain Canadian government approval would be a legitimate ground for waiver, NYT has not met its statutory obligation. NYT has presented no evidence (much less clear and convincing evidence) to show that its inability to secure the necessary international coordination or approval is or has been “unremediable.”

To a substantial extent, even though international coordination takes place between governmental agencies, the pace of such coordination is often determined by how actively the applicant licensee pursues its application. Only in March 2005 did NYT amend its pending application to propose an alternate site to resolve potential interference problems with Canadian-licensed stations. NYT has not shown that it could not have taken this step in the six years during which its application has been pending or that the time since it has identified the alternative site will not permit it to build a full-power antenna by April 30, 2006. Since NYT did not provide clear and convincing evidence of unremediable delay within the statutorily mandated period, the Commission should decline NYT’s requested waiver and allow consumers access to distant digital network signals by satellite if they cannot receive a local over-the-air digital signal. Further, it is important to keep in mind that consumers would still be required to purchase the station’s analog signal from the satellite carrier (where available),¹⁶ and that as soon as NYT makes its digital signal available in an area, no new consumers will be permitted to subscribe to the distant digital network signal.

¹⁶ 47 U.S.C. § 339(a)(2)(D).

F. WUTV-DT, Buffalo, New York

WUTV Licensee LLC (“WUTV”) claims a waiver of the digital testing trigger date on the grounds that its digital signal coverage has been limited “as a result of a two-year delay in obtaining Industry Canada approval for its digital station.”¹⁷ However, as WUTV admits, Canadian approval for its full-power facilities was obtained in September 2004 and the Commission has since granted WUTV a construction permit for its full power facilities.¹⁸ A subsequent delay allegedly caused by potential interference with a new NTSC Television station in Bath, New York, is not an international coordination issue, and is not a statutorily permissible ground for a digital testing waiver. It follows that any limitations on WUTV’s digital signal coverage are not due to the unremediable presence of the need for international coordination or approval, as required by Section 339(a)(2)(D)(viii)(I). Accordingly, the Commission should deny WUTV’s waiver request and allow consumers to have access to distant digital network signals by satellite if they cannot receive a local over-the-air digital signal.

G. WTVH-DT, Syracuse, New York

WTVH License, Inc. (“WTVH”) claims a waiver for WTVH-DT “because WTVH’s digital signal coverage is presently limited due to the need to obtain international coordination.”¹⁹

¹⁷ Letter from Kathryn R. Schmeltzer and Tony Lin, Counsel for WUTV Licensee LLC, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Nov. 29, 2005).

¹⁸ *Id.* at 2.

¹⁹ Letter from Tom W. Davidson, Counsel for WTVH License, Inc. to Marlene H. Dortch, Secretary, FCC, at 1, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005).

While EchoStar recognizes that unavoidable administrative delay caused by the need to obtain Canadian government approval would be a legitimate ground for waiver, WTVH has not met its statutory obligation. WTVH has presented no evidence (much less clear and convincing evidence) to show that its inability to secure the necessary international coordination or approval is or has been “unremediable.”

WTVH does not explain why it waited until August 2005 to file its minor modification application to construct its full power facilities, which it must have known would require Canadian approval.²⁰ Other stations in WTVH’s market were not similarly impeded, which only heightens the need for WTVH to provide clear and convincing evidence that its circumstances are unremediable. It appears, therefore, that WTVH’s digital coverage is limited not because of the “unremediable presence” of the need for international approval, but because of the timing of its own application. Accordingly, the Commission should decline WTVH’s requested waiver and allow consumers to have access to distant digital network signals by satellite if they cannot receive a local over-the-air digital signal.

H. WBNX-DT, Syracuse, New York

Winston Broadcasting Network, Inc. (“WBN”) claims a waiver for WBNX-DT on the grounds that “the station is waiting for international coordination with Canada.”²¹

²⁰ WTVH’s analog transmitter is situated within the Canadian border zone as well.

²¹ Letter from Nathaniel J. Hardy, Counsel for Winston Broadcasting Network Inc. to Marlene H. Dortch, Secretary, FCC, at 1, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005).

While EchoStar recognizes that unavoidable administrative delay caused by the need to obtain Canadian government approval would be a legitimate ground for waiver, WBN has not met its statutory obligation. Even though international coordination takes place between governmental agencies, the pace of such coordination is often determined by how actively the licensee pursues its application. Apparently, WBN was informed in December 2003, a full two years ago, that its construction permit could not be granted because the proposed facilities did not adequately protect DTV Channel 30 in Paris, Ontario.²² WBN responded by amending its application in February 2004.²³ However, the solution proposed by WBN appears not to have been accepted by Industry Canada.²⁴ WBN restated its position in an April 2004 letter,²⁵ but WBN presents no evidence that it has taken any specific steps in the 20 months since that letter to resolve Industry Canada's concerns. WBN makes only the general assertion that "Winston's negotiations with Industry Canada are ongoing."²⁶

Moreover, it appears that WBN has not obtained a special temporary authority to provide lower power digital service in the interim. Thus, while a waiver might serve WBN's private interest by protecting it from distant signal competition, it would greatly disserve the public interest by depriving *all* Cleveland-Akron consumers of access to both

²² *Id.* at Exhibit 2.

²³ *Id.* at 2.

²⁴ *Id.* at Exhibit 1, p.1.

²⁵ *Id.* at Exhibit 1.

²⁶ *Id.* at 2.

the over-the-air digital signal of the local WB affiliate *and* any distant WB signal that satellite carriers might import.

In such circumstances, WBN has not presented the requisite “clear and convincing evidence” that its digital coverage is limited due to the “unremediable presence” of the need for international coordination or approval. Accordingly, the Commission should decline WBN’s requested waiver and allow consumers to have access to distant digital network signals by satellite if they cannot receive a local over-the-air signal.

I. KENS-DT, San Antonio, Texas

KENS-TV, Inc. (“KENS-TV”) requests a waiver of the digital signal testing commencement date on the grounds that its pending application to modify its DTV construction permit to allow higher power, permanent operations from its current temporary facility “is awaiting international approval from Mexico.”²⁷

While EchoStar recognizes that unavoidable administrative delay caused by the need to obtain Mexican government approval would be a legitimate ground for waiver, KENS has not met its statutory obligation. KENS-TV has presented no evidence (much less clear and convincing evidence) to show that its inability to secure the necessary international coordination or approval is or has been “unremediable.”

According to its waiver request, KENS-TV only applied to increase the power at its temporary facility and to convert it to its permanent facility in June 2005, when it “realized that it had inadvertently failed to modify its original DTV construction permit

²⁷ Letter from John M. Burgett, Counsel for KENS-DT, Inc. to Marlene H. Dortch, Secretary FCC, at 2, *filed in* MB Docket No. 05-317 (filed Nov. 29, 2005).

to conform it to the station's 'as built' facilities."²⁸ Inadvertence is within the licensee's power to control, however. Any limitation on KENS-TV's digital coverage is not due to the need for Mexican approval of its pending modification application but due to the late timing of that application -- a matter wholly within KENS-TV's control and a situation that could have been averted if only KENS-TV had realized earlier that it needed to file a modification application. It is important to keep in mind that consumers would still be required to purchase the station's analog signal from the satellite carrier, and that as soon as KENS-TV makes its digital signal available in an area, no new consumers will be permitted to subscribe to the distant digital network signal.

KENS-TV also notes that, while San Antonio, Texas, is a top-100 market, KENS-TV has not received a tentative channel designation on its allotted digital channel and has not been found by the Commission to have lost interference protection. According to KENS-TV, this means it would not be subject to the April 30, 2006, trigger date for digital testing.²⁹ But even stations that have not received a channel designation are subject to the digital testing trigger date if they have lost interference protection.³⁰ KENS-TV has missed its replication maximization deadline and therefore will lose its protection unless the Commission were to grant its pending request for waiver of the maximization deadline. In other words, KENS-TV is attempting to bootstrap one lapse

²⁸ *Id.* at 2.

²⁹ 47 U.S.C. § 339(a)(2)(D)(vii).

³⁰ 47 U.S.C. § 339(a)(2)(D)(vii)(I)(aa) (providing for digital signal testing to begin on "April 30, 2006, if such local network station is within the top 100 television markets and--(AA) has received a tentative digital television service channel designation that is the same as such station's current digital television service channel; or (BB) has been found by the Commission to have lost interference protection; . . .").

onto another by using its failure to meet a Commission deadline to escape a statutory one. The Commission should deny the requested waiver and allow consumers to have access to a distant digital network signal by satellite, if they cannot receive a local over-the-air digital signal.

J. KTWB-DT, Seattle, Washington

Tribune Television Holdings, Inc., (“TTH”) claims a waiver for digital testing for KTWB-DT “because it has been unable to complete construction of KTWB-DT’s maximized facility due to a delay in securing Canadian consent/coordination.”³¹

The TTH waiver request has been filed outside the statutory deadline and therefore must be denied. Section 339(a)(2)(D)(viii) provides that digital testing waiver requests “shall be filed not less than 5 months prior to” the April 30, 2006 trigger date -- *i.e.*, by November 30, 2005.³² This deadline is statutory and expressed in mandatory terms; it cannot be extended by the Commission. In this case, TTH’s waiver request is dated December 1, 2005, and the “Date Received/Adopted” stamp on the Commission’s Electronic Comment Filing System (“ECFS”) for its filing is December 2, 2005. Accordingly, TTH’s waiver request must be denied for being untimely.

Even if it were timely, TTH’s waiver request must be denied for failing to establish any of the statutory criteria. While EchoStar recognizes that unavoidable

³¹ Letter from Thomas P. Van Wazer, Counsel for Tribune Television Holdings, Inc. to Marlene H. Dortch, Secretary, FCC, at 1, *filed in* MB Docket No. 05-317 (dated Dec. 1, 2005; filed Dec. 2, 2005).

³² *See* 47 U.S.C. §339(a)(2)(D)(viii) (“Such a request shall be filed not less than 5 months prior to the implementation deadline . . .”); *see also* Public Notice, “DTV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to be filed by November 30, 2005 on February 15, 2007,” DA 05-2979 (rel. Nov. 17, 2005).

administrative delay caused by the need to obtain Canadian government approval would be a legitimate ground for waiver, TTH has not met its statutory obligation. TTH has presented no evidence (much less clear and convincing evidence) to show that its inability to secure the necessary international coordination or approval is or has been “unremediable.”

Even though international coordination takes place between governmental agencies, the pace of such coordination is often determined by how actively the licensee pursues its application. TTH acknowledges that it learned “several years ago” that the Commission had been unable to complete coordination with Canada. While noting “repeated attempts” by Commission staff to secure coordination for KTWB’s maximization application, TTH does not provide any evidence of what steps it has taken, if any, to facilitate or avoid the need for coordination in the six years during which its application has been pending. This falls short of the “clear and convincing” evidence needed to show that KTWB’s digital coverage has been limited by the “unremediable presence” of the need for international coordination. Accordingly, TTH’s waiver request must be denied and consumers should be allowed access to a distant digital network signal by satellite if they cannot receive a local over-the-air digital signal..

K. KUSA-DT, Denver, Colorado

On November 28, 2005, Gannett Co., Inc. (“Gannett”) requested a waiver of digital signal testing for KUSA-DT³³ based on “extensive and ongoing zoning issues at Lookout Mountain, Colorado, which continue to prevent Denver television broadcasters,

³³ Letter from David P. Fleming, Senior Legal Counsel, Gannett Co., Inc., to Nazifa Sawez, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 28, 2005) (“Gannett Request”).

including KUSA, from constructing and operating permanent DTV facilities.”³⁴

Gannett’s request, however, fails to meet the basic requirements for a waiver, and therefore, should be rejected.³⁵

As discussed above, Section 339(a)(2)(D)(viii) requires that a station requesting a testing waiver submit “clear and convincing evidence” that the situation supporting its request is unremediable. In the case of zoning issues, the hurdle is even taller: the station must present clear and convincing evidence of “*clear* zoning or environmental legal impediments”³⁶ that are unremediable.

EchoStar is familiar with the zoning issues and related litigation hurdles faced in connection with Lookout Mountain facilities. However, while co-location with the analog facilities might well be more cost efficient, this is not a statutorily permissible ground for the grant of a waiver. While Gannett provides a description of the litigation, it does not present any indication that it has considered any alternative permanent site for KUSA’s full-power digital antenna.³⁷ Gannett does refer to a reduced digital facility that it operates pursuant to Special Temporary Authority, but fails to explain why that facility could not be converted to a full-power facility or why it has not investigated other sites as alternative locations, or, if it has, why those locations were unsuitable. Other such facilities would appear to be available, albeit at added expense, and Gannett does not

³⁴ *Id.*

³⁵ See 47 U.S.C. § 339(a)(2)(D)(viii).

³⁶ 47 U.S.C. § 339(a)(2)(D)(viii)(II).

³⁷ Gannett Request, Attachment entitled “Status Report on Lake Cedar Group Multi-User Tower on Lookout Mountain”.

allege anything to the contrary. The fact that the zoning litigation became lengthy and intractable should have prompted Gannett to explore alternatives. Just because there would be cost savings from collocating multiple stations on a single tower does not excuse Gannett from having to explore alternative sites, particularly when the zoning issues surrounding the proposed collocation site are being heavily contested. In fact, the statute specifically states that *under no circumstances* may a waiver be based on financial exigency. The financial cost of separate analog and digital towers therefore is not a permitted excuse for avoiding digital signal testing.

Congress allowed for satellite subscribers to request digital broadcast signal testing in order to provide an incentive to consumers to purchase digital television equipment and to encourage broadcasters to complete the digital transition quickly. If stations, such as KUSA-DT, are allowed to avoid digital signal testing simply by biding their time while zoning litigation progresses, Congress's intent to speed up the digital transition will be eviscerated. It is important to note as well that satellite subscribers seeking to receive a distant digital signal also will have to subscribe to KUSA's analog signal.³⁸ Since Gannett has failed to provide clear and convincing evidence that it has pursued reasonable alternatives, it does not appear that clear zoning impediments prevent permanent operation of KUSA-DT and are unremediable. Therefore, its request for a digital testing waiver should be rejected.

³⁸ 47 U.S.C. § 339(a)(2)(D)(iii).

L. KWGN-DT, Denver, Colorado

On December 1, 2005, KWGN Inc. ("KWGN") requested a waiver of digital signal testing for KWGN-DT³⁹ due to alleged zoning impediments.⁴⁰ KWGN claims that it "has been unable to complete construction of its maximized DTV facility because it has been unable to secure local approval of a building permit needed to construct/install" its facilities at Lookout Mountain in Colorado.⁴¹ KWGN's waiver request should be rejected for four reasons. First, the request was filed after the November 30, 2005 statutory deadline.⁴² This deadline is expressed in mandatory terms and cannot be extended. KWGN's letter is dated December 1, 2005, and the "Date Received/Adopted" stamp on the Commission's Electronic Comments Filing System for its filing is December 2, 2005. Accordingly, KWGN's waiver request is untimely under SHVERA and should be denied.

Second, EchoStar is familiar with the zoning issues and related litigation hurdles faced in connection with Lookout Mountain facilities. However, while co-location with the analog facilities might well be most cost efficient, this is not a statutorily permissible ground for the grant of a waiver.

³⁹ Letter from Thomas P. Van Wazer, Counsel to KWGN-DT, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (dated Dec. 1, 2005, filed Dec. 2, 2005) ("KWGN Request").

⁴⁰ *See id.* at n.2 (citing 47 U.S.C. §339(a)(2)(D)(viii)(II)).

⁴¹ *See* KWGN Request at 2.

⁴² *See* 47 U.S.C. §339(a)(2)(D)(viii) ("Such a request shall be filed not less than 5 months prior to the implementation deadline . . ."); *see also* Public Notice, "DTV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to be filed by November 30, 2005 on February 15, 2007," DA 05-2979 (rel. Nov. 17, 2005).

Third, KWGN makes no statements as to its effort to avoid the delay by identifying alternative tower locations that would not be subject to the same obstacles. KWGN does refer to a “DTV STA facility” that began operating in November 2003, but KWGN fails to explain why this facility is not capable of providing permanent digital service.⁴³ However, the financial cost of separate analog and digital towers is not a permitted excuse for avoiding digital signal testing, in light of the prohibition in the statute that *under no circumstances* may a waiver be based on financial exigency. Without specific information on KWGN’s efforts to find an alternative permanent location for its digital antenna, KWGN has not met its burden to provide “clear and convincing evidence” of the unremediable presence of clear zoning impediments. Therefore, its request should be rejected.

Fourth, KWGN’s argument that a waiver should be granted because satellite carriers are not carrying the digital signal of any WB affiliate misses the mark. This is not a valid ground for waiver under SHVERA. At most, Section 339(a)(2)(D)(viii)(VI) permits a waiver when “no satellite carrier is providing the retransmission of the *analog* signals of local network stations . . . in the local market.”⁴⁴ EchoStar, at least, retransmits the analog signal of KWGN in the Denver DMA. No similar waiver is permitted when a *digital* signal (whether local or distant) is not being carried. The Commission has no statutory authority to grant KWGN a waiver on this imaginary criterion.

⁴³ *Id.* at 2.

⁴⁴ 47 U.S.C. §339(a)(2)(D)(viii)(VI) (emphasis added).

M. KREG-DT, Glenwood Springs, Colorado

Hoak Media of Colorado, LLC (“Hoak”) has asked the Commission for a determination that the April 30, 2006 digital signal testing deadline established in Section 339(a)(2)(D)(vii) does not apply to its KREG-DT station.⁴⁵ In its request, Hoak asserts that it should not be considered within the Denver designated market area (“DMA”) because it “serves primarily rural communities located in and around the Grand Junction-Montrose, Colorado Designated Market Area.” Grand Junction-Montrose is not in the top 100 television markets in the country. In the alternative, Hoak seeks a waiver based on force majeure because “the arbitrary assignment of KREG by Nielsen to the Denver DMA is beyond KREG’s control and thus constitutes a force majeure event.”⁴⁶

Hoak’s primary claim that it should not be considered in the Denver DMA is simply not one of the enumerated grounds for a waiver under Section 339(a)(2)(D)(viii). The Commission does not have the statutory authority to grant a waiver to Hoak on this new criterion. Even if its claim were to be countenanced, KREG should continue to be considered within the Denver DMA because Nielsen has previously determined that KREG’s analog signal reaches the population of viewers within the Denver DMA. A DMA, by its nature, “consists of all counties whose largest viewing share is given to stations of that same market area.”⁴⁷ Therefore, Nielsen already has determined that the

⁴⁵ Letter from Tom W. Davidson, Counsel for Hoak Media of Colorado, LLC, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) (“Hoak Request”).

⁴⁶ *Id.* at n.1.

⁴⁷ See the definition of a DMA provided by Nielsen Media Research, at http://www.nielsenmedia.com/FAQ/dma_satellite%20service.htm.

television viewing population of the Denver DMA watches KREG. Indeed, Hoak itself has admitted that the majority of its audience is located in the Denver DMA. In its request for a waiver of the replication/maximization deadline, Hoak stated that “approximately one quarter of the population KREG serves resides within the Grand Junction DMA,” implying that the remaining three quarters reside in the Denver DMA.⁴⁸ If Hoak feels aggrieved by its inclusion in the Denver DMA, its proper remedy is to contact Nielsen to request an adjustment in DMA boundaries.

Hoak’s force majeure argument should be rejected on similar grounds. A digital signal testing waiver may only be provided if the requesting station has demonstrated by “clear and convincing evidence that the station’s digital signal coverage is limited due to the unremediable presence of one or more” of the listed circumstances.⁴⁹ This is clearly not force majeure. First of all, KREG is free to present Nielsen with the data that, in its view, supports a change. Second, it is not Nielsen that has limited KREG’s digital signal coverage. Hoak chose not to construct digital facilities for KREG and, instead, sought a waiver. Hoak’s decision does not qualify as a force majeure event, and therefore is not grounds for a digital testing waiver.

⁴⁸ Letter from Tom W. Davidson, Counsel to Hoak Media of Colorado, LLC, to Marlene H. Dortch, Secretary, FCC, at 2, *filed in* MB Docket No. 03-15 (filed July 1, 2005).

⁴⁹ 47 U.S.C. §339(a)(2)(D)(viii).

N. KOAA-DT, Pueblo, Colorado

Sangre de Cristo Communications (“SCC”) seeks a waiver of the digital signal testing requirements in Section 339 for its digital television station, KOAA-DT.⁵⁰ SCC relies on the fact that it has not received final approval from local authorities to construct its tower and the impending winter weather to assert its right to a waiver.⁵¹ Beyond its bare assertion that it has not received final approval, however, SCC fails to explain why this situation is unremediable. Equally important, SCC does not explain why it has been less successful in obtaining such approvals than other stations in the same market.

SCC repeatedly quotes from the Commission’s *Advanced Television Systems Order*⁵² to claim that the Commission will “grant an extension of the DTV construction deadline ‘where a broadcaster has been unable to complete construction due to circumstances that are either unforeseeable or beyond the licensee’s control if the licensee has taken all reasonable steps to resolve the problem expeditiously’.”⁵³ However, neither the requirements of Section 339 nor of the *Advanced Television Systems Order* are met in SCC’s request. SCC does not provide any explanation for why its inability to secure a local building permit within the year following Commission

⁵⁰ Letter from Scott S. Patrick, Counsel for Sangre de Cristo Communications, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) (“SCC Request”).

⁵¹ *See id.*; *see also id.*, Exhibit No. 1.

⁵² *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶77 (1997).

⁵³ SCC Request, Exhibit No. 1 at 1.

authorization was beyond its control.⁵⁴ Clearly other stations in the same market were not similarly impeded, heightening the need for SCC to provide clear and convincing evidence that its circumstances were unremediable. If the delay was the result of SCC inaction, it should not justify a waiver of the digital signal testing requirements. Furthermore, SCC has not demonstrated that it has taken “all reasonable steps to resolve the problem expeditiously.”⁵⁵

As discussed above, Section 339(a)(2)(D)(viii) requires broadcasters to submit clear and convincing evidence that the circumstance creating a need for a waiver is unremediable. To the extent SCC provides any information on its current construction status, its explanation is muddled. In its waiver request and in one part of the exhibit attached to the request, SCC simply states that it “continues to await final approval and permitting from local authorities.”⁵⁶ In another part of the exhibit, SCC states that “construction has been delayed by legal proceedings beyond Sangre de Cristo’s control.”⁵⁷ SCC has not met its evidentiary burden and should not be allowed to skirt its obligations based on such perfunctory statements.

SCC’s also relies on the winter weather as support for its waiver request. However, while EchoStar recognizes that extreme weather could constitute force majeure (as in the case of hurricanes in New Orleans), SCC has not provided any evidence of any

⁵⁴ *See id.*

⁵⁵ *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶77 (1997).

⁵⁶ *See* SCC Request, Exhibit No. 1 at 1; *see also* SCC Request at 2.

⁵⁷ *See id.* at 2.

specific instance of extreme winter weather that may have delayed construction of its tower.

Accordingly, since SCC has not provided clear and convincing evidence of unremediable delay within the statutorily mandated period, the Commission should decline SCC's requested waiver and allow consumers to have access to distant digital network signals by satellite if they cannot receive a local over-the-air digital signal.

O. KSPR-DT, Springfield, Missouri and WJCL-DT, Savannah, Georgia

On November 30, 2005, Piedmont Television of Springfield License LLC and Piedmont Television of Savannah License LLC (collectively, "Piedmont") requested the Commission waive the digital signal testing requirements of Section 339(a)(2)(D)(viii) for its stations KSPR-DT in Springfield, Missouri and WJCL-DT in Savannah, Georgia.⁵⁸

For both stations, Piedmont argued that its pending applications to further extend the replication/maximization deadline and prior authorized extensions "qualify as a force majeure event" that excuses both stations from being subjected to digital signal testing. This argument completely misunderstands the nature of a force majeure event and should be rejected. Force majeure is defined as "an event or effect that cannot be reasonably anticipated or controlled."⁵⁹ Here, Piedmont had full control over whether to construct full-power digital facilities or request an extension of its replication/maximization

⁵⁸ Letter from Joseph M. Di Scipio, Counsel for Piedmont Television of Springfield License LLC and Piedmont Television of Savannah License LLC, to Nazifa Savez, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) ("Piedmont Request").

⁵⁹ See Merriam-Webster Online Dictionary, *at* <http://www.webster.com/dictionary/force%20majeure>.

deadline. The fact that it chose to file for extensions rather than complete construction of its digital facilities is not an excuse for Piedmont to avoid digital signal testing. Piedmont cannot bootstrap its own decision not to meet a Commission deadline as justification for a waiver of a statutory deadline. Equally important, Piedmont does not explain why it has been less successful in meeting its replication/maximization deadline than other stations in the same market.

Moreover, the analysis of EchoStar's engineering consultants show that KSPR-DT and WJCL-DT are currently operating at only a tiny fraction of their authorized power levels (0.23% and 0.62% respectively).⁶⁰ Piedmont offers no explanation for not building more substantial digital facilities before its replication/maximization deadline and, moreover, provides no evidence that it made a genuine attempt to meet that deadline. To the extent that Piedmont is relying on financial hardship as a ground for an extension of the replication/maximization deadline,⁶¹ the same ground would not be justification for a waiver of the digital testing trigger date. SHVERA specifically provides that *under no circumstances* can financial exigency be the basis for such a waiver.

Piedmont also claims a waiver for KSPR-DT under Section 339(a)(2)(D)(viii)(IV) on the ground that it is "not mounted on its main tower, but is mounted on an auxiliary

⁶⁰ Statement of Hammett & Edison, Inc., Consulting Engineers, at 3, 4 ("Hammett and Edison Report") (attached hereto as Attachment A).

⁶¹ Piedmont's request for confidential treatment of its request for waiver of the stations' replication/maximization deadlines on the ground that "the financial information set forth therein is proprietary and it not customarily disclosed to the public" is highly suggestive. See Letter from Joseph Di Scipio, Counsel for Piedmont Television Holdings LLC, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 03-15, at 1 (filed June 30, 2005).

tower, which results in a substantial decrease in coverage area.”⁶² However, the relevant prerequisite to a waiver is that the station experiences “a substantial decrease in [the station’s] digital signal coverage area *due to necessity of using side-mounted antenna*”⁶³ and not because the station decided to place its digital antenna on an auxiliary tower. The Commission cannot grant Piedmont-Springfield’s waiver request when none of the statutory criteria has been met.

Because Piedmont has not shown that KSPR-DT or WJCL-DT meets any of the statutory grounds for waiver and keeping in mind that the consumer will have to subscribe to the local network station’s analog signal by satellite as well,⁶⁴ the Commission should deny Piedmont’s waiver requests with respect to both stations and allow consumers in Piedmont’s markets to have access to a distant digital network signal by satellite if they cannot receive a local over-the-air digital signal.

P. WBRZ-DT, Baton Rouge, Louisiana

Louisiana Television Broadcasting, LLC (“LTB”) has requested a waiver of Section 339(a)(2)(D)(vii) for its station, WBRZ-DT⁶⁵ based on the fact that the digital station has been operating a side-mounted antenna under Special Temporary Authority.⁶⁶ LTB provides no evidence that the use of a side-mounted antenna is necessary or

⁶² Piedmont Request at 2.

⁶³ 47 U.S.C. § 339(a)(2)(D)(viii) (emphasis added).

⁶⁴ 47 U.S.C. § 339(a)(2)(D).

⁶⁵ Letter from Clyde N. Pierce, Director of Engineering for Louisiana Television Broadcasting, LLC, to Nazifa Sawez, FCC, *filed in* MB Docket No. 05-31 (filed Nov. 30, 2005).

⁶⁶ *See* 47 U.S.C. § 339(a)(2)(D)(viii)(II).

represents an unremediable circumstance preventing WBRZ-DT from providing full digital service. This failure is particularly important because, under LBT's logic, the requested waiver, based on its use of a side-mounted antenna, would remain in effect until the end of the digital transition, a result that Congress clearly did not intend.

As described above, Section 339(a)(2)(D)(viii) requires "clear and convincing evidence" that the circumstance requiring a waiver is unremediable. LTB does not provide any evidence that there is no other means of providing digital service other than a side-mounted antenna. Moreover, under the relevant statutory factor, use of a side-mounted antenna must be "necess[ary]."⁶⁷ LTB does not even explain why a side-mounted antenna is required, nor does it describe any efforts to find an alternative means of providing full digital service. Without this evidence, LTB's waiver request fails to meet the basic requirements of the statute and should be dismissed.

Congress clearly did not intend to provide broadcast stations with a free pass until 2009, which would be the result if waivers were granted on such scant evidence. Rather, Congress intended to provide consumers with access to digital programming that would otherwise not be available, unless the local network station can demonstrate through clear and convincing evidence the unremediable presence of exceptional circumstances. Since LTB has failed to make the required showing, its waiver request must be denied. It is important to keep in mind that as soon as LTB makes its digital signal available in an area, no new consumers will be permitted to subscribe to the distant digital network signal.

⁶⁷ 47 U.S.C. § 339(a)(d)(D)(viii)(IV).

Q. KMTV-DT, Omaha, Nebraska and WSAZ-DT, Huntington, West Virginia

On November 29, 2005, Emmis Television License, LLC (“Emmis”) requested a digital signal testing waiver for its stations WSAZ, operating in Huntington, West Virginia,⁶⁸ and KMTV, operating in Omaha, Nebraska.⁶⁹ Both waiver requests rely on Emmis’s use of side-mounted digital antennas. Emmis’s requests should be rejected because they fail to demonstrate that either station “experiences a substantial decrease in its digital signal coverage due to necessity of using side-mounted antenna.”⁷⁰ Moreover, the true reason for continued use of side-mounted antennas in this case appears to be impermissible financial exigency.⁷¹

Emmis has not met its statutory obligation to support its waiver requests with clear and convincing evidence. Emmis has not provided any evidence on the impact its side-mounted antennas have on the digital coverage area for each station. The reduction in coverage must be “substantial” in order to override Congress’s intent to encourage consumers to transition to digital television. KMTV-DT’s antenna appears to be only “immediately below” its analog antenna, so the decrease in coverage area will likely not be substantial. This failure is particularly important because, under Emmis’s logic, the

⁶⁸ Letter from Marnie K. Sarver, Counsel for Emmis Television License, LLC, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 29, 2005) (“WSAZ Request”).

⁶⁹ Letter from Marnie K. Sarver, Counsel for Emmis Television License, LLC, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 29, 2005) (“KMTV Request”).

⁷⁰ 47 U.S.C §339(a)(2)(D)(viii)(IV).

⁷¹ 47 U.S.C §339(a)(2)(D)(viii) (“Under no circumstances may such a waiver be based upon financial exigency.”).

requested waivers, based on its use of side-mounted antennas, would remain in effect until the end of the digital transition, a result that Congress clearly did not intend.

Furthermore, Emmis provides no evidence that its current situation is necessary and unremediable. Emmis's waiver requests do not indicate any attempt on Emmis's part to identify an alternative method of providing full digital service prior to the digital transition. Since Emmis has not shown that any actual decrease in coverage is unavoidable as a result of its use of side-mounted antennas, its waiver requests should be denied.

In addition, Emmis effectively acknowledges that its reasons for continuing use of side-mounted antennas are based on a financial exigency. In its requests for waiver of the Commission's replication/maximization deadline attached to each waiver request, Emmis argues that its should not be required to "swap" its top-mounted analog antenna with its side-mounted digital antenna because it "would require the expenditure of significant resources" ⁷² Section 339(a)(2)(D)(viii), however, makes clear that: "Under no circumstances may [a digital testing] waiver be based upon financial exigency."

Finally, as EchoStar has stated in opposition to other waiver requests, consumers who cannot receive a broadcaster's digital signal due to its decision to use a side-mounted antenna should not be made to suffer without digital television. This is particularly true in light of the fact that Congress passed the digital signal testing provisions in order to allow consumers that could not receive local digital broadcast signals to receive distant digital signals (provided they also subscribe to the analog signal of the local station,

⁷² See WSAZ Request, Attachment A at 2; *see also* KMTV Request, Attachment A at 2.

where available).⁷³ Without any evidence as to the necessity of a side-mounted antenna for either digital station, Emmis's only justification for the requested digital testing waivers is impermissible financial exigency. Its waiver requests should therefore be denied.

R. KENV-DT, Elko, Nevada

Ruby Mountain Broadcasting Company ("Ruby Mountain") has requested a digital signal testing waiver for its station, KENV-DT, operating in Elko, Nevada, on the grounds that its decision to "flash cut" to digital transmission at the end of the digital transition represents a force majeure event that qualifies for a waiver.⁷⁴ This argument misses the point. The decision by Ruby to "flash cut" from analog to digital is not a statutorily permissible ground for a waiver. Moreover, this argument comes close to making a force majeure event out of Congress's decision to mandate the DTV transition. It misunderstands the nature of force majeure and would vitiate Congress's purpose in allowing satellite subscribers to import digital broadcast signals where their local broadcast stations have failed to provide service.

Force majeure is defined as "an event or effect that cannot be reasonably anticipated or controlled."⁷⁵ Here, Ruby Mountain explicitly states that, "[i]n its initial channel election, Ruby Mountain made an election to 'flash cut' to digital operations on

⁷³ 47 U.S.C §339(a)(2)(D)(iii) and (v).

⁷⁴ Letter from Jonathan S. Lichstein, Corporate Counsel for Sunbelt Communications Company, parent of Ruby Mountain Broadcasting Company, to Nazifa Sawez, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) ("Ruby Request").

⁷⁵ See Merriam-Webster Online Dictionary, *at* <http://www.webster.com/dictionary/force%20majeure>.

its analog channel.”⁷⁶ Ruby Mountain had complete control over this decision and it cannot qualify as a force majeure event under SHVERA. Consumers in Elko, Nevada should not be deprived of the opportunity to view HD network programming from a distant station during the DTV transition, simply because the local network station has decided to take the “flash cut” option. Congress clearly did not intend broadcast stations to avoid digital signal testing until the end of the DTV transition based only on its choice of transition options.

Since Ruby Mountain has not demonstrated that its failure to provide digital service is due to any of the six categories delineated by Congress, Ruby Mountain’s waiver request should fail.

S. KVVN-TV, Ely, Nevada

Valley Broadcasting Company (“Valley”) has requested a digital signal testing waiver for its station, KVVN, operating in Ely, Nevada.⁷⁷ Valley’s request asserts that KVVN “did not receive a second channel for digital operations because the Commission granted its initial construction permit after digital allocations were provided to existing operators.”⁷⁸ According to Valley, this fact constitutes force majeure for which it is entitled to a waiver under Section 339(a)(2)(D)(viii)(III).

⁷⁶ See Ruby Request.

⁷⁷ Letter from Jonathan S. Lichstein, Corporate Counsel for Sunbelt Communications Company, parent of Valley Broadcasting Company, to Nazifa Sawez, FCC, filed in MB Docket No. 05-317 (filed Nov. 30, 2005).

⁷⁸ *Id.* at 1.

Force majeure is defined as “an event or effect that cannot be reasonably anticipated or controlled.”⁷⁹ The circumstance cited by Valley is clearly not such an event. Commission action to implement the DTV transition had already begun at the time Valley applied for its analog construction permit. Moreover, it appears that Valley has no intention of converting to digital transmission on the grounds that “[s]witching to digital operations would result in the loss of the only form of broadcast television to the vast majority of the community.”⁸⁰ Consumers should not be deprived of access to digital network programming pursuant to digital signal testing, as Congress intended, when the local network station will not be converting to digital operations.

In addition, Valley claims that “allowing viewers to seek a digital signal strength test would jeopardize its ability to provide over-the-air television to a small rural community.” This is not one of the statutory grounds enumerated in Section 339(a)(2)(D)(viii) and therefore cannot justify the grant of a digital testing waiver.

For these reasons, Valley’s waiver request must be denied so that consumers who cannot receive its analog signal over-the-air can receive digital network programming from a distant station via satellite.

T. KAYU-TV, Spokane, Washington

Mountain Licensee L.P. (“Mountain”), claims a waiver of the digital testing trigger date for KAYU-TV on two grounds: (1) “[b]ecause Mountain has elected to operate digitally on Channel 28, not Channel 30, at the end of the transition, KAYU-TV

⁷⁹ See Merriam-Webster Online Dictionary, at <http://www.webster.com/dictionary/force%20majeure>.

⁸⁰ *Id.* at 1.

will have to go through the international coordination process for digital Channel 28 before it can operate on that channel”;⁸¹ and (2) “KAYU-TV’s current digital facility operates with a side-mounted antenna, which in turn leads to a substantial decrease in KAYU-TV’s digital signal coverage area.”⁸²

With respect to international coordination, Mountain admits that it is currently operating on digital Channel 30 and that DTV operations on that channel have been coordinated with Canada. The fact that it has elected to switch to Channel 28 *post*-transition (and thus has subjected itself to another round of coordination) does not affect whether its digital coverage is *currently* being limited by the need for international coordination or approval, as required by Section 339(a)(2)(D)(viii). Indeed, by Mountain’s own admission, current DTV operations on Channel 30 have been coordinated. The circumstances described by Mountain therefore do not warrant the grant of a digital testing waiver.

With respect to KAYU’s use of side-mounted antennas, Mountain has not presented sufficient evidence to meet the “clear and convincing evidence” standard needed to show that the use of side-mounted antennas (a) is necessary, (b) has led to a substantial decrease in digital signal coverage area, and (c) is unremediable.

The waiver request contains only a declaration by KAYU-TV’s Chief of Engineering regarding the side-mounting of its digital antenna⁸³ and a bare assertion in

⁸¹ Letter from Dennis P. Corbett, Counsel for Mountain Licensee L.P. to Marlene Dortch, Secretary, FCC, at 1, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005).

⁸² *Id.* at 1-2.

⁸³ *Id.* at Declaration ¶ 2.

the cover letter that this “leads to a substantial decrease in KAYU-TV’s digital signal coverage area.”⁸⁴ Mountain does not provide any reasons for the side-mounting of the antennas and, moreover, concedes that it has not provided all of the information necessary to determine the extent of the alleged decrease in coverage area (e.g. output power).⁸⁵ Equally important, KAYU does not explain why it has been less successful in overcoming this obstacle than other stations in the same market. Broadcasters should not be permitted to file such additional information in reply or in *ex parte* presentations, as satellite carriers would thereby be deprived of a full opportunity to respond.

Accordingly, because Mountain has not supported its waiver request with anything other than bare assertions, its waiver request must be denied.

U. KATV-DT, Little Rock, Arkansas

KATV, LLC (“KATV”) has requested a waiver of Section 339(a)(2)(D)(vii) for its digital station, KATV-DT, operating in Little Rock, Arkansas, based on its use of a side-mounted antenna.⁸⁶ In its request, KATV claims that it “is in the process of replacing its top-mounted analog channel 7 antenna with a combined channel 7/22 antenna,” and, until that process is complete, it must operate a side-mounted digital

⁸⁴ *Id.* at 2.

⁸⁵ *See id.* at n.1 (“Should the Commission require any additional information concerning the impact of side-mounting on KAYU-TV’s digital coverage, Mountain will provide it.”).

⁸⁶ Letter from Thomas P. Van Wazer, Counsel to KATV, LLC, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) (“KATV Request”).

antenna that is incapable of providing full digital service.⁸⁷ However, KATV fails to demonstrate that this situation cannot be remedied.

While KATV spends much time describing the capability of the future dual band antenna it intends to install, it does not provide any explanation as to why it is operating its current DTV STA facility at only 10 kW when its construction permit authorizes a “maximized” effective radiated power (“ERP”) of 750 kW and the antenna described in its STA request is capable of operating at an ERP of over 800 kW.⁸⁸ This fact would appear to contradict KATV’s assertion that its STA facility “cannot provide service to its maximized DTV service area.”⁸⁹ KATV also does not explain why it could not have obtained an STA to operate its digital facilities at higher power. The probable explanation is not the side-mounting of the antennas but KATV’s decision not to make the necessary investments for full-power DTV operations. Section 339(a)(2)(D)(viii) makes clear that *under no circumstances* can financial exigency be a ground for waiver.

KATV’s waiver request fails for another reason -- it does not even mention the effect its use of a side-mounted antenna has had on its digital signal coverage area. Section 339(a)(2)(D)(viii)(IV) requires broadcasters to demonstrate by clear and convincing evidence that they will suffer a “substantial” decrease in digital signal coverage in order to obtain a waiver. KATV’s failure to provide any evidence of any such decrease, as required under the statute, should therefore result in denial of its waiver

⁸⁷ *Id.* at 1-2.

⁸⁸ See FCC File No. BPCDT-19991027ABF; FCC File No. BMDSTA-20040409. Hammett and Edison Report at 3-4.

⁸⁹ KATV Request at 1-2.

request. It is important to keep in mind that consumers who now cannot receive KATV's digital signal would still be required to purchase the local network station's analog signal from the satellite carrier (where available)⁹⁰ in order to qualify for distant digital network programming, and that as soon as KATV makes its digital signal available in an area, no new consumers will be permitted to subscribe to the distant digital network signal.

V. KCRA-DT, Sacramento, California

On November 29, 2005, Hearst-Argyle Stations, Inc. ("Hearst-Argyle") requested a digital signal testing waiver for KCRA-DT operating in Sacramento, California.⁹¹ Hearst-Argyle's reliance on the side-mounted antenna waiver criteria provided under Section 339(a)(2)(D)(viii)(IV) appears to be simply a veil for its true justification: impermissible financial exigency.⁹²

Hearst-Argyle's own request admits that, "were KCRA-DT to proceed with construction of its replication facility before the end of the DTV transition, Hearst-Argyle would have to expend considerable resources to move its NTSC antenna to a lower level on the tower to make room for its DTV antenna."⁹³ Congress expressly stated, however, that *under no circumstances* can financial exigency be the basis for a waiver of the digital signal testing trigger date.⁹⁴ At the very least, KCRA-DT should have

⁹⁰ 47 U.S.C. §339(a)(2)(D).

⁹¹ Letter from David Kushner, Counsel to Hearst-Argyle Stations, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 29, 2005).

⁹² *See id.* at 2.

⁹³ *Id.*

⁹⁴ 47 U.S.C. §339(a)(2)(D)(viii).

investigated other alternatives to a side-mounted antenna (*e.g.* using a separate tower or different orientation) and presented evidence of its efforts in this regard.

Moreover, Hearst-Argyle has not shown that there is a substantial decrease in coverage area. It admits that its current digital coverage of 93% of the coverage of its certified “maximized” facilities. This is consistent with the calculations of EchoStar’s engineering consultants.⁹⁵ Such a small difference is not a “substantial” decrease for the purposes of qualifying for a digital testing waiver.

If broadcasters are allowed to take advantage of the narrow waivers provided in Section 339(a)(2)(D)(viii) without clear and convincing proof that a side-mounted antenna is necessary and that its use has led to a substantial decrease in digital coverage area, broadcasters would be able to avoid digital signal testing until that time. Congress certainly did not intend to give broadcasters a free pass on digital signal testing until the end of the digital transition, particularly in light of the fact that a satellite subscriber must subscribe to the analog signal of the local network station (where available).⁹⁶ Rather, Congress’s intent was to provide consumers with access to HD network programming that would not otherwise be available, except in very limited circumstances. Hearst-Argyle has simply not established that any of the statutory grounds for waiver is satisfied in its circumstances, and its waiver request must therefore be denied.

W. WFTS-DT, Tampa, Florida

Tampa Bay Television, Inc. (“TBT”) seeks a digital testing waiver for WFTS-DT pursuant to Section 339(a)(2)(D)(vii)(IV) -- namely, a substantial decrease in digital

⁹⁵ Hammett & Edison Report at 2.

⁹⁶ 47 U.S.C. §339(a)(2)(D).

coverage area due to the necessity of side-mounted antennas.⁹⁷ However, an examination of TBT's filing shows that this is not the basis of its waiver request at all. Rather, TBT admits that it cannot provide full digital service over its digital antenna because the transmission line feeding that antenna is limited by the fact that it runs through another broadcaster's antenna.⁹⁸ Any decrease in digital coverage area in this instance, therefore, is not the result of the use of side-mounted antennas. In fact, it appears that WFTS-DT's antenna is not presently side-mounted and is already at (or above) the height specified in its construction permit for maximized facilities.⁹⁹

TBT concedes as much when it explains in its waiver request that "WFTS-DT's signal coverage area is substantially decreased due to physical constraints on its tower that can only be addressed at the end of the digital transition—constraints that are directly comparable in effect to utilizing a side-mounted antenna."¹⁰⁰ Of course, many different factors can cause a substantial decrease in the digital coverage area of a station, including inadequate power. But Congress has only recognized one such cause as a ground for a digital testing waiver -- the necessary use of a side-mounted antenna. Just because

⁹⁷ Letter from Kenneth C. Howard, Jr., Counsel to Tampa Bay Television, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) ("TBT Request").

⁹⁸ *Id.*, at Attachment, pp. 1-2.

⁹⁹ *Id.* at Attachment, p.1 ("WFTS . . . applied for and constructed maximized facilities with an ERP of 500 kW at an HAAT of 476m. WFTS-DT has operated with these 500 kW licensed facilities since March, 2002. The WFTS construction permit for further maximized facilities specifies an ERP of 987 kW at an HAAT of 475m.").

¹⁰⁰ *Id.* at 1.

WFTS-DT faces physical constraints “comparable in effect” to the use of side-mounted antennas does not convert an invalid ground for waiver into a valid one.¹⁰¹

Accordingly, because TBT has failed to make even the threshold showing that it is even using side-mounted antennas, its waiver request must be denied.

X. WPBF-DT, Tequesta, Florida

On November 29, 2005, WPBF-TV Company (“WPBF”) requested a digital testing waiver for its digital station, WPBF-DT, based on its use of a side-mounted antenna.¹⁰² In order to secure a waiver, WPBF must show by clear and convincing evidence that its use of a side-mounted digital antenna is necessary, unremediable, and causes a substantial decrease in coverage area. WPBF has not made the required showing. Rather, WPBF’s waiver request appears based on financial exigency -- an impermissible ground for the grant of a digital testing waiver.

WPBF claims that “WPBF-DT to proceed with construction of its maximized facility before the end of the DTV transition, Hearst would have to expend considerable resources to move its NTSC antenna to a lower level on the tower to make room for its DTV antenna.” However, the statute provides that *under no circumstances* may financial exigency be the basis of a digital testing waiver.¹⁰³ At the very least, WPBF-DT

¹⁰¹ Even if WFTS-DT’s waiver request were to be countenanced as a “side-mounted antenna” case, it has not shown a substantial decrease in coverage area. *See* Hammett & Edison Report at 2 (calculating that WFTS-DT’s current facilities would cover 99.47% of the population that would be covered by its “maximized” facilities).

¹⁰² Letter from David Kushner, Counsel for WPBF-TV Company, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317, at 2 (filed Nov. 29, 2005) (“WPBF Request”).

¹⁰³ 47 U.S.C. § 339(a)(2)(D)(viii).

should have explored alternative means of providing full digital service (*e.g.* using a separate tower or different orientation) and presented evidence of its efforts in this regard. Congress did not intend to give broadcasters a free pass on digital testing until the end of the digital transition, particularly in light of the fact that a satellite subscriber must subscribe to the analog signal of the local network station (where available).¹⁰⁴ Rather, Congress's intent was to ensure that consumers have access to HD network programming from a distant digital station when the same is not available to them from the local network station, unless the station can prove exceptional circumstances on clear and convincing evidence.

Here, the more likely explanation for WPBF's reduced digital coverage appears to be "financial exigency" -- an impermissible ground for a digital testing waiver. WPBF admits that: "were WPBF-DT to proceed with construction of its maximized facility before the end of the DTV transition, [WPBF] would have to expend considerable resources to move its NTSC antenna to a lower level on the tower to make room for its DTV antenna."¹⁰⁵ Section 339(a)(2)(D)(viii) specifically provides, however, that *under no circumstances* may a digital testing waiver be granted because of financial exigency.

WPBF also has not shown that the current situation results in a "substantial decrease in its digital signal coverage area."¹⁰⁶ By its own admission, its side-mounted

¹⁰⁴ 47 U.S.C. §339(a)(2)(D).

¹⁰⁵ WPBF Request at 2.

¹⁰⁶ 47 U.S.C. §339(a)(2)(D)(viii)(IV).

digital antenna reaches 93.3% of its maximized coverage area.¹⁰⁷ EchoStar's engineering consultant calculates that WPBF's current digital coverage area is 95.45% (by population) of the coverage area of its "maximized" facility.¹⁰⁸ Under either set of calculations, this difference in coverage area appears to be inconsistent with SHVERA's requirement that the decrease in coverage area be "substantial." Accordingly, WPBF's waiver request should be denied.

Y. WSIL-DT, Harrisburg, Illinois

WSIL-TV, Inc. ("WSIL") has requested a digital testing waiver for its digital station operating in Harrisburg, Illinois, based on its use of a side-mounted digital antenna.¹⁰⁹ WSIL's request fails to provide clear and convincing evidence that its use of a side-mounted digital antenna is necessary, unremediable and is resulting in a substantial decrease in digital coverage area.¹¹⁰ Rather, WSIL's true reason for seeking a waiver, appears to be its unwillingness to bear the cost of providing the service.

In its request, WSIL states that "were WSIL-DT to proceed with construction of its maximized facility before the end of the DTV transition, WSIL would have to expend considerable resources to move its NTSC antenna to a lower level on the tower to make room for its DTV antenna. However, the statute provides that *under no circumstances*

¹⁰⁷ WPBF Request at 2. WPBF-DT fails to reach 169,837 people out of a maximized service population of 2,529,151.

¹⁰⁸ Hammett & Edison Report at 3.

¹⁰⁹ Letter from David Kushner, Counsel for WSIL-TV, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317, at 2 (filed Nov. 29, 2005) ("WSIL Request").

¹¹⁰ *See* 47 U.S.C. § 339(a)(2)(D)(viii)(IV).

may financial exigency be the basis of a digital testing waiver.¹¹¹ At the very least, WSIL-DT should have explored alternative means of providing full digital service (*e.g.* using a separate tower or different orientation) and presented evidence of its efforts in this regard. Congress did not intend to give broadcasters a free pass on digital testing until the end of the digital transition, particularly in light of the fact that a satellite subscriber must subscribe to the analog signal of the local network station (where available).¹¹² Rather, Congress's intent was to ensure that consumers have access to HD network programming from a distant digital station when the same is not available to them from the local network station, unless the station can prove exceptional circumstances on clear and convincing evidence.

WSIL also fails to prove through clear and convincing evidence that the decrease in its coverage area from the use of a side-mounted antenna is "substantial."¹¹³ According to WSIL's submission, its current digital service reaches 95.5% of the population predicted to be served by its maximized facility.¹¹⁴ EchoStar's engineering consultant calculates that the WPBF's current coverage area is 94.45% (by population) of the coverage area of its "maximized" facility.¹¹⁵ Under either set of calculations, the small difference in coverage area appears to be inconsistent with SHVERA's requirement

¹¹¹ 47 U.S.C. § 339(a)(2)(D)(viii).

¹¹² 47 U.S.C. § 339(a)(2)(D).

¹¹³ See 47 U.S.C. § 339(a)(2)(D)(viii)(IV).

¹¹⁴ WSIL Request at 2. WSIL states that it will lose service to 30,734 people where it is predicted to serve 688,167 people with its maximized facility.

¹¹⁵ Hammett and Edison Report at 3.

that the decrease in coverage area be “substantial.” Accordingly, WPBF’s waiver request should be denied. Such a limited loss of digital coverage area is inconsistent with the requirement in Section 339(a)(2)(D)(viii)(IV) that the decrease in coverage area be “substantial.” Accordingly, the Commission should deny WSIL’s waiver request and allow consumers who cannot receive a digital signal over the air access to distant digital network channels by satellite.

Z. WXYZ-DT, Detroit, Michigan

Channel 7 of Detroit, Inc., (“Channel 7”) has requested a waiver of digital signal testing pursuant to Section 339(a)(2)(D)(viii)(IV) for its digital station, WXYZ-DT, operating in Detroit, Michigan.¹¹⁶ Channel 7’s request fails to provide clear and convincing evidence that its use of a side-mounted antenna is necessary, unremediable, and the cause of a “substantial” decrease in digital coverage area.

Channel 7 has asserted in this request,¹¹⁷ and in a prior request for waiver of the replication/maximization deadline,¹¹⁸ that it cannot install its digital antenna in the top-mounted position because that location is occupied by its NTSC antenna. While the engineering statement attached to its replication/maximization deadline waiver request provides some evidence as to the obstacles facing an attempt to “swap” the NTSC and the digital antenna, the primary justification appears to be financial exigency. In its

¹¹⁶ Letter from Kenneth C. Howard, Jr., Counsel for Channel 7 of Detroit, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317, at 1 (filed Nov. 30, 2005).

¹¹⁷ *See id.*, Attachment at 1.

¹¹⁸ Letter from Kenneth C. Howard, Jr., Counsel for Channel 7 of Detroit, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 03-15, Attachment (filed July 1, 2005) (“Maximization Waiver Request”).

replication/maximization waiver request, Channel 7 stated “full compliance prior to the cessation of analog service would harm Station WXYZ-TV’s analog viewers and *impose excessive costs on the station.*”¹¹⁹ Because Channel 7’s own submissions indicate that the side-mounted digital antenna is not the only way it can provide digital service until the end of the digital transition, it has not provided clear and convincing evidence of the unremediable nature of the situation. At the very least, Channel 7 should have explored alternative means of providing full digital service and presented evidence of its efforts in this regard. Congress did not intend to give broadcasters a free pass on digital testing until the end of the digital transition, particularly in light of the fact that a satellite subscriber must subscribe to the analog signal of the local network station (where available).¹²⁰ Rather, Congress’s intent was to ensure that consumers have access to HD network programming from a distant digital station when the same is not available to them from the local network station, unless the station can prove exceptional circumstances on clear and convincing evidence.

In addition, WXYZ’s loss in digital coverage area certainly should not qualify as “substantial” for purposes of Section 339(a)(2)(D)(viii)(IV). In the engineering report attached to its request, Channel 7 asserts that current operations will result in “a substantial decrease of approximately 121 sq. km (0.75%) in its digital signal coverage area within its DMA boundaries.” This is clearly an insubstantial decrease in coverage within the station’s DMA. Congress could not have intended to protect a station against

¹¹⁹ See *id.* at 1 (emphasis added); see also *id.*, Attachment at 2 (“The cost of accomplishing the changes in location of analog antenna and the digital antenna is estimated to be between \$850,000 and \$1,000,000.”).

¹²⁰ 47 U.S.C. §339(a)(2)(D).

such limited coverage area loss when the purpose of digital testing waivers was to protect consumers from the delay of broadcasters. Even if the Commission were to look at Channel 7's earlier statement that its digital service covers "98.5% of the population inside the noise-limited contour," such loss is equally minimal and does not justify the grant of a digital testing waiver.¹²¹ Accordingly, because Channel 7's use of a side-mounted antenna is neither necessary nor unremediable, and does not result in a substantial decrease in digital signal coverage area, Channel 7's waiver request must be denied.

AA. KOCO-DT, Oklahoma City, Oklahoma

Ohio/Oklahoma Heart-Argyle Television, Inc. ("Hearst-Argyle") has requested a digital testing waiver for its digital station, KOCO-DT, operating in Oklahoma City, Oklahoma, based on its use of a side-mounted digital antenna.¹²² Hearst-Argyle's request fails to provide clear and convincing evidence that its use of a side-mounted digital antenna is unremediable and that the resulting loss in digital coverage area is substantial.¹²³ Moreover, Hearst-Argyle's true reason for seeking a waiver rather than providing full digital service appears to be its unwillingness to bear the cost of providing such service.

¹²¹ Maximization Waiver Request at 2-3. EchoStar's engineering consultants calculated that Channel 7's current digital facilities cover 98.01% (by population) of its maximized facilities. Hammett & Edison Report at 2.

¹²² Letter from David Kushner, Counsel for Ohio/Oklahoma Hearts-Argyle Television, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317, at 2 (filed Nov. 29, 2005) ("KOCO Request").

¹²³ *See* 47 U.S.C. §339(a)(2)(D)(viii)(IV).

According to Hearst-Argyle, “were KOCO-DT to proceed with construction of its maximized facility before the end of the DTV transition, Hearst-Argyle would have to significantly modify its tower with more structural support, which three years ago was estimated to cost approximately \$1,145,000 and would require KOCO’s NTSC facility to operate at reduced power for at least a month during the construction of the tower support.”¹²⁴ However, the statute provides that *under no circumstances* can financial exigency be the basis for a digital testing waiver.¹²⁵ At the very least, Hearst-Argyle should have explored alternative means of providing full digital service (*e.g.* using a separate tower or different orientation) and presented evidence of its efforts in this regard. Congress did not intend to give broadcasters a free pass on digital testing until the end of the digital transition, particularly in light of the fact that a satellite subscriber must subscribe to the analog signal of the local network station (where available).¹²⁶ Rather, Congress’s intent was to ensure that consumers have access to HD network programming from a distant digital station when the same is not available to them from the local network station, unless the station can prove exceptional circumstances on clear and convincing evidence.

Furthermore, Hearst-Argyle fails to explain why it did not seek to operate its STA facility at a higher power in order to compensate for the decreased height of its antenna. According to EchoStar’s engineering consultants, the allowable ERP for height above average terrain associated with Hearst-Argyle’s STA is much higher than the 47 kW

¹²⁴ KOCO request at 2.

¹²⁵ 47 U.S.C. §339(a)(2)(D)(viii).

¹²⁶ 47 U.S.C. §339(a)(2)(D).

specified in the STA.¹²⁷ EchoStar's engineering consultant has determined that the necessary ERP of its STA facility would have to be 56.8 kW in order to replicate its maximized facility, Hearst-Argyle has not provided any explanation of why it did not request authority to operate at the higher ERP. Any decrease in digital coverage caused by side-mounting could have been remedied (at least in part) by operating at higher power

Hearst-Argyle also fails to prove through clear and convincing evidence that the decrease in coverage area is "substantial."¹²⁸ According to Hearst-Argyle's submission, its current digital service reaches 99.2% of the population predicted to be served by its maximized facility.¹²⁹ EchoStar's engineering consultants calculate that KOCO's current digital facilities cover 98.86% (by population) of the coverage area of its "maximized" facilities.¹³⁰ Under either set of calculations, this difference is not consistent with Section 339(a)(2)(D)(viii)'s requirement that the decrease in coverage area be "substantial." Accordingly, the Commission should deny KOCO's request and allow consumers access to distant digital channels.

¹²⁷ Hammett & Edison at 4.

¹²⁸ See 47 U.S.C. §339(a)(2)(D)(viii)(IV).

¹²⁹ KOCO-DT currently is capable of reaching 1,400,772 people out of the 1,411,803 people it is predicted to serve by its maximized facility. KOCO Request at 2; *see also* Letter from Mark J. Prak, Counsel for Ohio/Oklahoma Hearts-Argyle Television, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 03-15, at 2 (filed June 30, 2005).

¹³⁰ Hammett & Edison at 4.

BB. WCPO-DT, Cincinnati, Ohio

On November 30, 2005, Scripps Howard Broadcasting Company (“Scripps”) requested a digital signal testing waiver for its station, WCPO-DT, operating in Cincinnati, Ohio.¹³¹ The sole basis for this request was its use of a side-mounted digital antenna under Section 339(a)(2)(D)(viii)(IV).¹³² However, Scripps has failed to provide clear and convincing evidence that use of a side-mounted antenna is necessary, unremediable and is the cause of a “substantial” decrease in the station’s digital signal coverage area.¹³³

Although Scripps previously has provided some evidence of the hurdles it faces in “swapping” its analog antenna with its digital antenna, Scripps fails to explain why a side-mounted digital antenna was the most effective means of providing digital service during the digital transition. Under the evidentiary standard established in the statute, Scripps must show, by clear and convincing evidence, the unremediable nature of the substantial decrease in coverage area caused by its use of a side-mounted antenna. At the very least, Scripps should have explored alternative means of providing full digital service (*e.g.* using a separate tower or different orientation) and presented evidence of its efforts in this regard. Scripps has provided no such evidence. Congress did not intend to give broadcasters a free pass on digital testing until the end of the digital transition, as would result if Scripps were to be granted a waiver on the grounds that it asserts,

¹³¹ Letter from Kenneth C. Howard, Jr., Counsel for Scripps Howard Broadcasting Co., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) (“Scripps Request”).

¹³² *Id.*

¹³³ See 47 U.S.C. §339(a)(2)(D)(viii)(IV).

particularly in light of the fact that a satellite subscriber must subscribe to the analog signal of the local network station (where available).¹³⁴ Rather, Congress's intent was to ensure that consumers have access to HD network programming from a distant digital station when the same is not available from the local network station, unless the station can prove unremediable presence of a specific statutory factor on clear and convincing evidence. Scripps has failed to do so.

The decrease in WCPO-DT's digital signal coverage area certainly does not qualify as "substantial" for purposes of Section 339(a)(2)(D)(viii)(IV). In the engineering report attached to its request, Scripps asserts that its current operations result in a "decrease of approximately 169 sq. km (0.86%) in its digital signal coverage area within its DMA boundaries."¹³⁵ This is not a substantial decrease in WCPO-DT's coverage area within its DMA. Even if the Commission were to look at the reduction in coverage within the station's certified replication contour, Scripps's own statement is that its existing digital service covers "98.4% of the population within" that contour. Similarly, EchoStar's engineering consultants calculate that Scripps' present facilities cover 97.13% (by population) of the coverage area of Scripps' maximized facilities.¹³⁶ Such decreases are not substantial and do not justify a grant of a waiver against digital

¹³⁴ 47 U.S.C. §339(a)(2)(D).

¹³⁵ Scripps Request at Attachment, p.1.

¹³⁶ Hammett & Edison Report at 4.

signal testing.¹³⁷ Accordingly, WCPO-DT's request should be denied and consumers should be allowed access to distant digital network stations.

CC. WGBA-DT, Green Bay, Wisconsin

Journal Broadcast Corporation ("JBC") has requested a digital signal waiver for its digital station, WGBA-DT, operating in Green Bay, Wisconsin, based on its use of a side-mounted digital antenna.¹³⁸ In its request, however, JBC has not provided clear and convincing evidence that use of the side-mounted antenna is unnecessary or unremediable, and it cannot show that the resulting decrease in its digital signal coverage area is substantial.¹³⁹

JBC's request fails to provide any information as to the other alternatives it considered to a side-mounted digital antenna and, if other options were considered, why they were rejected. Without such information, one cannot determine if JBC's use of a side-mounted antenna was necessary. JBC does not appear to have considered whether use of a separate tower or a different position for the side-mounted antenna on the tower may improve its coverage. This failure is particularly important considering that the requested waiver, based on JBC's use of a side-mounted antenna, would remain in effect until the end of the digital transition, a result that Congress clearly did not intend.

¹³⁷ Letter from Kenneth C. Howard, Jr., Counsel to Scripps Howard Broadcasting Company, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 03-15, at 1 (filed July 1, 2005).

¹³⁸ Letter from Mace J. Rosenstein, Counsel to Journal Broadcast Corporation, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317, at 2 (filed Nov. 30, 2005) ("JBC Request").

¹³⁹ 47 U.S.C. §339(a)(2)(D)(viii)(IV).

JBC also has not demonstrated that the loss of WGBA-DT's digital signal coverage area resulting from its side-mounted antenna is substantial. JBC admits in its request that its "facilities provide service to approximately 98 percent of the population predicted to receive service from its full authorized facilities."¹⁴⁰ According to EchoStar's consultants, WGBA-DT's current digital operations cover 97.31% (by population) of the coverage area of JBC's maximized facilities.¹⁴¹ Such small differences are not "substantial," and WGBA certainly did not think so in its application for its most recent STA when it asserted that "at the proposed 600 kilowatts ERP, [WGBA-DT] will provide DTV service to 100 percent of the population predicted to receive analog service from WGBA's licensed facilities"¹⁴²

Moreover, as EchoStar's engineering consultants suggest, such decreases in digital coverage could be remedied by obtaining authority to operate at higher power.¹⁴³ WGBA's construction permit for its full-power digital facilities authorizes operations at 1000 kW, yet WGBA only obtained an STA for operations at 600 kW. It could have sought and obtained an STA to operate at a higher power to overcome the decrease in digital coverage area, and it has not explained why it did not do so. If this decision is based on the financial cost of operations at higher power, it cannot justify a digital testing waiver. *Under no circumstances* can such a waiver be based on financial exigency.

¹⁴⁰ JBC Request at 2.

¹⁴¹ Hammett & Edison Report at 5.

¹⁴² Letter from Mace J. Rosenstein, counsel to Journal Broadcast Corporation, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 03-17, at 1 (filed June 30, 2005).

¹⁴³ Hammett & Edison Report at 5.

Thus, because JBC has not provided clear and convincing evidence that it will suffer an unremediable and substantial decrease in its digital signal coverage area, JBC's waiver request should be denied and consumers should be allowed access to distant digital channels.

DD. WDRB-DT, Louisville, Kentucky

Independence Television Company ("Independence") has requested a digital signal testing waiver for its digital station, WDRB-DT, operating in Louisville, Kentucky.¹⁴⁴ According to Independence, its use of a side-mounted digital antenna, necessitated by the structural limitations of its tower, qualifies for a waiver under Section 339(a)(2)(D)(viii)(IV).¹⁴⁵

As EchoStar discusses above, Congress set the bar high when it established the six instances in which a broadcaster may be protected from digital signal tests. The waiver ground upon which Independence relies requires a broadcaster to provide clear and convincing evidence that it suffers from an "unremediable" and "substantial" decrease in its digital signal coverage area."¹⁴⁶ Independence, in its request, has failed to meet either of these requirements.

In this case, Independence applied to use a side-mounted antenna in July 2005 and received its authorization to do so in August 2005. However, no evidence has been presented to show that Independence has constructed a side-mounted antenna or even

¹⁴⁴ Letter from Scott S. Patrick, Counsel to Independence Television Company, to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) ("Independence Request").

¹⁴⁵ *Id.* at 2.

¹⁴⁶ 47 U.S.C. §339(a)(2)(D)(viii)(IV).

begun construction of one. This suggests that any present deficit in Independence's digital coverage area is not due to Independence's present use of a side-mounted antenna (since there is no such antenna), but due to Independence's own delay in constructing DTV facilities.

In addition, while Independence does purport to explain its choice of a side-mounted antenna,¹⁴⁷ it does not explain why it concluded that a single tower with a side-mounted digital antenna was the most appropriate means of operation. To show that the proposed use of a side-mounted antenna is "necessary" or "unremediable," Independence must at least explain why there were no alternative means of providing full digital service during the digital transition. This is particularly important considering that the requested waiver, based on Independence's use of a side-mounted antenna, would remain in effect until the end of the digital transition, a result that Congress clearly did not intend.

In addition, Independence has failed to show that its proposed use of a side-mounted antenna has led to a substantial decrease in digital signal coverage area. In its waiver request, Independence asserts that WDRB-DT currently provides coverage to 93.4% of its protected service contour.¹⁴⁸ EchoStar's engineering consultants calculate that WDRB-DT's STA facility would cover 94.53% (by population) of the coverage area of its maximized facilities.¹⁴⁹ Such a small difference in coverage area appears to be inconsistent with SHVERA's requirement that the reduction in digital coverage area be "substantial." Accordingly, the Commission should reject Independence's waiver request

¹⁴⁷ Independence Request at 2.

¹⁴⁸ *Id.*

¹⁴⁹ Hammett & Edison Report at 5.

and allow consumers who cannot receive a local digital signal over the air access to distant digital channels.

EE. WEWS-DT, Cleveland, Ohio

Scripps Howard Broadcasting Company (“Scripps”) claims a digital testing waiver for WEWS-DT on the ground that the station experiences a substantial decrease in its digital signal coverage area due to the necessity of using a side-mounted antenna.¹⁵⁰ However, Scripps has not presented clear and convincing evidence that a side-mounted antenna is necessary or unremediable, or that the decrease in digital signal coverage is “substantial,” as required by SHVERA.

Scripps has not presented evidence to show that use of a side-mounted antenna is necessary or unremediable. The clear and convincing evidence standard requires Scripps to at least outline alternatives to side-mounting (*e.g.* operations from a different location) that it considered, if any, and to explain why it settled on side-mounting. It has not done so here. Such evidence is particularly important in light of the fact that the requested waiver, based on Scripps’ use of a side-mounted antenna, would remain in effect until the end of the digital transition, a result that Congress clearly did not intend. It should be remembered that the commencement of digital testing does no more than allow eligible consumers to receive HD network programming that would not otherwise be available to it.

In addition, Scripps’ own filing states that “[t]he lower antenna height will cause WEWS to experience a substantial decrease of approximately 1,066 sq. km (5.25%) in its

¹⁵⁰ Letter from Kenneth C. Howard, Jr., Counsel for Scripps Howard Broadcasting Co. to Marlene Dortch, Secretary, FCC, at 1, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005) (“WEWS-DT Request”).

digital signal coverage area within its DMA boundaries.” This is hardly a substantial decrease. Even if the Commission were to consider the effect on service coverage outside the station’s DMA, EchoStar’s engineering consultants calculate that WEWS’s current digital facility covers 96.51% (by population) of the coverage area of the station’s maximized facilities.¹⁵¹ Such a small difference is also not substantial and does not justify the grant of a digital testing waiver.

Accordingly, the Commission should deny Scripps’ waiver request and allow consumers access to distant digital channels.

FF. WAPT-DT, Jackson, Mississippi

WAPT Hearst-Argyle Television, Inc. (“WAPT”) claims a waiver for WAPT-DT because “WAPT-DT ‘experiences a decrease in its digital signal coverage due to necessity of using [a] side-mounted antenna’.”¹⁵²

WAPT has not presented evidence to show that use of a side-mounted antenna is necessary or unremediable. The clear and convincing evidence standard requires WAPT to at least outline alternatives to side-mounting (*e.g.* operations from a different location) that it considered, if any, and to explain why it settled on side-mounting. It has not done so here. Such evidence is particularly important in light of the fact that the requested waiver, based on WPT’s use of a side-mounted antenna, would remain in effect until the end of the digital transition, a result that Congress clearly did not intend. It should be remembered that the commencement of digital testing does no more than allow eligible

¹⁵¹ Hammett & Edison at 5.

¹⁵² Letter from David Kushner and Coe W. Ramsey, Counsel for WAPT Hearst-Argyle Television, Inc. to Marlene H. Dortch, Secretary, FCC, at 2, *filed in* MB Docket No. 05-317 (filed Nov. 29, 2005) (“WAPT Request”).

consumers to receive HD network programming that would not otherwise be available to it.

In addition, WAPT's own filing admits that its current side-mounted digital facilities is predicted to serve 684,668 out of the 738,079 people (92.8%) that would be served by its certified "maximized" facilities. Such a small difference is inconsistent with SHVERA's requirement that the decrease in digital signal coverage area be "substantial." Accordingly, the Commission should deny WAPT's waiver request and allow consumers access to distant digital channels.

GG. WJAR-DT, Providence, Rhode Island

NBC Telemundo License Co. ("NBC") has requested a digital signal testing waiver for its digital station, WJAR-DT, operating in Providence, Rhode Island, based on the fact that it uses a side-mounted antenna.¹⁵³ Although NBC provides some information on the reasons why it cannot replace its analog antenna – occupying the top-mounted tower position – with its digital antenna, NBC fails to provide any evidence that use of a side-mounted antenna is necessary or that it causes a substantial loss in digital coverage area.

NBC's bare statement that it "has explored other means to maximize the facility's digital coverage area" does not meet the "clear and convincing" evidence standard required by SHVERA. That standard requires NBC to outline the options it considered and explain why each was rejected. Such information is particularly important in light of the fact that the requested waiver, based on NBC's use of a side-mounted antenna, would

¹⁵³ Letter from F. William LeBeau, Assistant Secretary and Senior Regulatory Counsel to NBC Telemundo License Co., to Secretary, FCC, *filed in* MB Docket No. 05-317, at 1 (filed Nov. 30, 2005).

remain in effect until the end of the digital transition, a result that Congress clearly did not intend. It should be remembered that the commencement of digital testing does no more than allow eligible consumers to receive HD network programming that would not otherwise be available to it.

Moreover, NBC's reference to its shared digital antenna does not bolster its request for a waiver. In its request, NBC states that, as a result of sharing its digital antenna with another station, "any change (including using a nondirectional pattern or a change in height in that shared antenna) would adversely affect the digital service of [the other station]."¹⁵⁴ Just because NBC would derive cost savings from using a shared antenna should not excuse it from digital testing. The statute squarely prohibits "financial exigency" as a ground for waiver. Thus, the additional cost of not using a shared antenna, or of coordinating the use of the same antenna with the other station, cannot justify a waiver.

NBC also provides no evidence as to the effect its side-mounted operations on WJAR-DT's digital signal coverage area. Section 47 U.S.C. §339(a)(2)(D)(viii)(IV) requires a broadcaster seeking a waiver to provide clear and convincing evidence that it will suffer a "substantial decrease in its digital signal coverage area." NBC does not mention any effect on its coverage area. Absent the requisite clear and convincing evidence that NBC's use of a side-mounted antenna is necessary, unremediable, and has led to a substantial decrease in digital signal coverage, the Commission must deny NBC's request and allow consumers who cannot receive a local digital signal over the air access to distant digital channels.

¹⁵⁴ *Id.* at 2.

HH. KTRK-DT, Houston, Texas

KTRK Television, Inc. (“KTRK”) has requested a waiver of the digital signal testing provisions pursuant to Section 339(a)(2)(D)(viii)(IV) based on its use of a side-mounted digital antenna.¹⁵⁵ Under the statute, KTRK must provide clear and convincing evidence that use of a side-mounted antenna is both necessary and unremediable. It also must provide evidence that any decrease in its digital coverage area due to such use is substantial. KTRK’s request provides little if any evidence (and certainly no clear and convincing evidence) to show that these requirements have been met. Its waiver request, therefore, must be rejected.

In arguing that its NTSC antenna occupies the top-mounted tower position, necessitating a side-mounted digital antenna, KTRK states that it “examined possible ways to increase KTRK-DT’s coverage, aside from a switch of antenna positions; however, these studies found no viable solution.”¹⁵⁶ This statement is insufficient to meet the high evidentiary standard of “clear and convincing evidence” established in the statute. Instead, KTRK should be required to outline the options it considered and explain why each was rejected. Such information is particularly important in light of the fact that the requested waiver, based on NBC’s use of a side-mounted antenna, would remain in effect until the end of the digital transition, a result that Congress clearly did not intend. It should be remembered that the commencement of digital testing does no

¹⁵⁵ Letter from Tom W. Davidson, Counsel to KTRK Television, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317, at 1 (filed Nov. 30, 2005) (“KTRK Request”).

¹⁵⁶ *Id.* at 3 n.9.

more than allow eligible consumers to receive HD network programming that would not otherwise be available to it

KTRK similarly has not demonstrated that its digital signal coverage loss is substantial. In its request, KTRK states that it is unable to serve 52,383 people, but it does not explain what percentage of its predicted maximized coverage area that number represents.¹⁵⁷ In its previously filed request to waive the replication/maximization deadline, KTRK submitted to the Commission that “KTRK’s replication percentage is 98.2%.”¹⁵⁸ This level of coverage does not demonstrate a substantial loss.

KTRK attempts to argue that a waiver will serve the public interest because it “will have only a short-term, temporary effect on satellite subscribers within KTRK-DT’s non-replicated area.”¹⁵⁹ What KTRK ignores is the fact that Congress specifically provided for digital signal testing *during* the DTV transition so that satellite subscribers who cannot otherwise receive the digital signals of a local network station over-the-air can instead receive a distant digital signal of a station affiliated with the same network.

KTRK also notes that, while Houston, Texas, is a top-100 market, KTRK has not received a tentative channel designation on its allotted digital channel and has not been found by the Commission to have lost interference protection.¹⁶⁰ As such, it would not

¹⁵⁷ *Id.*

¹⁵⁸ Letter from Tom W. Davidson, Counsel to KTRK Television, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 03-15, at 3 (filed July 1, 2005).

¹⁵⁹ KTRK Request at 3.

¹⁶⁰ *Id.* at 1-2.

be subject to the April 30, 2006, trigger date for digital testing.¹⁶¹ Even stations that have not received a channel designation, however, are subject to the digital testing trigger date if they have lost interference protection.¹⁶² KTRK has missed its replication maximization deadline and therefore will lose its protection unless the Commission were to grant its pending request for waiver of the maximization deadline. In other words, KTRK is attempting to bootstrap one lapse onto another by using its failure to meet a Commission deadline to escape a statutory one.

III. COMMENTS ON WVNY-DT, WFFF-DT AND WPTZ-DT

Three stations in the Burlington-Plattsburgh DMA have filed waiver requests: WVNY-DT and WFFF-DT of Burlington, Vermont, and WPTZ-DT of North Pole, New York.¹⁶³ EchoStar is not certain whether these requests meet the statutory standard, but is generally sympathetic to the combination of asserted justifications, and is not opposing them at this time, on the understanding that their digital facilities will be built by Fall 2006. The Commission should remain vigilant, however, and should in all likelihood decline to accede to a request for an extension of any waiver granted to those stations.

¹⁶¹ 47 U.S.C. § 339(a)(2)(D)(vii).

¹⁶² 47 U.S.C. § 339(a)(2)(D)(vii)(I)(aa) (providing for digital signal testing to begin on “April 30, 2006, if such local network station is within the top 100 television markets and--(AA) has received a tentative digital television service channel designation that is the same as such station's current digital television service channel; or (BB) has been found by the Commission to have lost interference protection; . . .”).

¹⁶³ Letter from Matthew S. DelNero, Counsel for Lambert Broadcasting of Burlington, LLC to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005); Letter from Scott S. Patrick, Counsel for Smith Media License Holdings, LLC to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005); Letter from David Kushner and Coe W. Ramsey, Counsel for Hearst-Argyle Stations, Inc. to Marlene H. Dortch, Secretary, FCC, *filed in* MB Docket No. 05-317 (filed Nov. 30, 2005).

Respectfully submitted,

/s/

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December 30, 2005

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Statement of Hammett & Edison, Inc., Consulting Engineers

The firm of Hammett & Edison, Inc., Consulting Engineers, has been retained by EchoStar Satellite L.L.C. to prepare an engineering statement concerning various requests for waiver of DTV signal testing pursuant to SHVERA.¹

Background

In its November 17, 2005, Public Notice, the Commission summarized the circumstances under which the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) allows local network stations to request a prohibition against using DTV signal level measurements to qualify satellite subscribers for so-called “distant network signal” DTV reception. As described in the Public Notice, Section 204 of SHVERA requires that,

To be grantable, waiver requests must provide clear and convincing evidence that the station’s digital signal coverage is limited due to the unremediable presence of one or more of the following:

- (I) the need for international coordination or approvals;
- (II) clear zoning or environmental legal impediments;
- (III) force majeure;
- (IV) the station experiences a substantial decrease in its digital signal coverage area due to the necessity of using a side-mounted antenna;
- (V) substantial technical problems that result in a station experiencing a substantial decrease in its coverage area solely due to actions to avoid interference with emergency response providers; or
- (VI) no satellite carrier is providing the retransmission of the analog signals of local network stations under section 338 in the local market.

The Act further provides that under no circumstances may such a waiver be based upon financial exigency.

Items (IV) and (V) relate to technical issues, which have been analyzed on a per-station basis by the undersigned.

Determination of Decrease in Digital Signal Coverage

As described in the Public Notice, Section 204 of SHVERA specifies that stations may seek waiver of the measurement option if clear and convincing evidence is provided that station’s coverage is unremediably and substantially decreased due to the necessity of using a side-mounted antenna. A quantitative definition of substantial decrease is not provided, so such determination is left to the discretion of the Commission. While the Public Notice refers to a “substantial decrease in digital

¹ FCC Public Notice DA 05-2979, November 17, 2005, “TV Station Requests for Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 to be Filed by November 30, 2005 or February 15, 2007.”



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signal coverage area,” the waiver requests filed by most broadcasters pursuant to the Notice that have been reviewed as part of this study have provided the reduction in coverage *population* as evidence of this decrease. For that reason, we have also used the calculated population served (2000 U.S. Census) in this analysis. Interference-free service from the subject facilities are calculated using the method of FCC OET Bulletin No. 69. In particular, the default parameters of 2- by 2-kilometer cells and 1 point per kilometer extraction from the USGS 3-second digital elevation model² are assumed to apply.

The baseline for determining decreased coverage is taken to be the interference-free coverage of the facility associated with the station’s pre-election certification as specified on FCC Form 381. The FCC’s December 19, 2005, Consolidated Database for Broadcast Services (CDBS) was used for the engineering specifications of each station.

Analysis of Stations Considered

In some cases, it seems likely that the station could have constructed interim DTV facilities having greater coverage, even without replacing its top-mounted NTSC antenna. That is, there is no apparent unremediable technical reason why the station should not have greater coverage at this time, perhaps even coverage substantially equal to its “certified” facility. Many TV stations across the U.S. have elected to build low-power interim DTV transmitting facilities; presumably this was done for sound business reasons, but that would also mean that those stations do not now qualify for the waiver allowed, under certain specific conditions, to prohibit qualified viewers from receiving distant network signal service via satellite.

KCRA-DT. Calculations of interference-free service using the OET-69 method show the following:

Allotment (certified facility):	5,252,569 persons
Licensed facility:	4,872,157
Percent coverage of licensed facility:	92.76%

WFTS-DT. Calculations of interference-free service using the OET-69 method show the following:

Construction Permit (certified facility):	4,149,745 persons
Licensed facility:	4,127,588
Percent coverage of licensed facility:	99.47%

In addition, WFTS has indicated that the reason that it cannot increase power at this time is because of limited power handling capability of the transmission line it installed, rather than anything pertaining to its antenna. Therefore, WFTS has not demonstrated that it could not have built facilities that are substantially equal to its “certified” service area.

² United States Geological Survey



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WPBF-DT. Calculations of interference-free service using the OET-69 method show the following:

Construction Permit (certified facility):	2,799,178 persons
STA facility:	2,671,882
Percent coverage of STA facility:	95.45%

WSIL-DT. Calculations of interference-free service using the OET-69 method show the following:

Construction Permit (certified facility):	700,952 persons
STA facility:	662,039
Percent coverage of STA facility:	94.45%

WXYZ-DT. The station's consulting engineer states that "WXYZ will experience a loss of 0.75% of its digital signal coverage area within its DMA boundaries." It is not clear why the evaluation was limited only to areas within the DMA.

Calculations of interference-free service using the OET-69 method show the following:

Allotment (certified facility):	5,769,266 persons
Licensed facility:	5,654,216
Percent coverage of licensed facility:	98.01%

KSPR-DT. KSPR claims that it is constrained to operate facilities under its STA at an ERP of 2.28 kilowatts. However, the antenna authorized under its STA (FCC File No. BDSTA-20040316AMH) is an Andrew Type AL8, capable of an ERP greater than 28 kW. Information published by the antenna manufacturer, Andrew,³ shows that the input power rating of this antenna is 2 kW and its numeric gain is 14.1, yielding an ERP of over 28 kW. It is therefore clear that the installed STA antenna is capable of dramatically greater ERP than 2.28 kW, and therefore also capable of correspondingly greater coverage.

KSPR has not demonstrated that it could not have built facilities that are substantially equal to its "maximized" authorization.

KATV-DT. KATV claims that it is constrained to operate facilities under special temporary authority ("STA") at an effective radiated power ("ERP") of 10 kilowatts. However, the antenna authorized under its STA (FCC File No. BMDSTA-20040409ABN), a Dielectric Type TLP-32E, is capable of an ERP greater than 750 kW, which is the ERP specified for its certified facility (FCC File No. BPCDT-19991027ABF). Information published by the antenna manufacturer, Dielectric,⁴ shows that the DTV input power rating of this antenna is 9.18 kW and its numeric gain is 120.9, yielding an ERP of over

³ Andrew Broadcast System Planner software, now ERI Broadcast System Planner

⁴ <http://www.dielectric.com/broadcast/brochures/TLP-brochure.pdf>



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1,000 kW. It is therefore clear that the installed STA antenna is capable of dramatically greater ERP than 10 kW, and therefore also capable of correspondingly greater coverage.

KATV has not demonstrated that it could not have built facilities that are substantially equal to its “maximized” authorization. It appears that KATV has merely elected to operate at a reduced ERP, as have many other stations.

WJCL-DT. WJCL claims that it is constrained to operate facilities under STA at an ERP of 1.23 kilowatts. However, the antenna authorized under its STA (FCC File No. BDSTA-20041221ACP) is almost certainly capable of greater ERP.⁵ This firm is aware of no commercially-marketed broadcast antennas that would be limited to such low power. It is therefore very likely that the installed STA antenna is capable of dramatically greater ERP than 1.23 kW, and therefore also capable of correspondingly greater coverage. In any case, the station has not indicated that it has explored a power increase using its existing (STA) antenna to better achieve coverage parity with its certified facilities.

Therefore, WJCL has not demonstrated that it could not have built facilities that are substantially equal to its “maximized” authorization.

KOCO-DT. Calculations of interference-free service using the OET-69 method show the following:

Construction Permit (certified facility):	1,352,166 persons
STA facility:	1,336,751
Percent coverage of STA facility:	98.86%

Additionally, the allowable ERP⁶ for the height above average terrain (“HAAT”) associated with the STA facility is much greater than 47 kW, which is the ERP specified in the STA. Therefore, it appears that the station could have applied for greater power, which might be sufficient to cover substantially more of its “certified” service area.

WCPO-DT. Calculations of interference-free service using the OET-69 method show the following:

Allotment (certified facility):	2,785,301 persons
Licensed facility:	2,705,465
Percent coverage of licensed facility:	97.13%

⁵ The specific antenna make and model are not specified in the FCC’s CDBS.

⁶ Section 73.622(f)(7) permits a maximum ERP of 107 kW at the STA height above average terrain of 370 meters. The 41 dBU coverage contour for the certified facility of KOCO-DT (34 kW ERP at 430 meters HAAT) extends 102.3 kilometers. To achieve the same contour distance with the STA facility (370 m HAAT) would require 56.8 kW, yet the station’s STA is for only 47 kW. No extension beyond the protected service contour associated with the certified facility appears to result from operation of the STA facility at 56.8 kW.



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WGBA-DT. The station states that the existing operation covers “approximately 98 percent of the population predicted to receive service from its full authorized facilities.” Calculations of interference-free service using the OET-69 method show the following:

Construction Permit (certified facility):	1,067,853 persons
STA facility:	1,039,130
Percent coverage of STA facility:	97.31%

The station’s existing STA antenna, a Dielectric Type TUA-C4-8/32U-1-S, is capable of greater ERP than 600 kW, and the station has not indicated that it has explored a power increase using that antenna, to better achieve coverage parity with its maximized facilities.

WDRB-DT. Calculations of interference-free service using the OET-69 method show the following:

Construction Permit (certified facility):	1,764,404 persons
STA facility:	1,667,944
Percent coverage of STA facility:	94.53%

WEWS-DT. Calculations of interference-free service using the OET-69 method show the following:

Allotment (certified facility):	4,182,754 persons
Licensed facility:	4,036,572
Percent coverage of licensed facility:	96.51%

Summary

The waiver requests from a total of 13 stations were analyzed for compliance with certain of the stated waiver criteria. In three cases,⁷ it is almost certain that the station could operate at greater power, and therefore achieve greater coverage, under a modified STA. In ten cases,⁸ the existing facilities cover over 90% of the population that would be covered by the station’s certified post-transition facilities, and in seven of those cases, the existing facilities cover over 95% of that population.

December 30, 2005



/s/ Robert D. Weller

Robert D. Weller, P.E.

⁷ KATV-DT, KSPR-DT, and WJCL-DT

⁸ KCRA-DT, WFTS-DT, WBPF-DT, WSIL-DT, WXYZ-DT, KOCO-DT, WCPO-DT, WGBA-DT, WDRB-DT, and WEWS-DT

⁹ WFTS-DT, WBPF-DT, WSIL-DT, WXYZ-DT, KOCO-DT, WCPO-DT, and WEWS-DT





February 17, 2006

Via ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and
Reauthorization Act of 2004 -- MB Docket No. 05-317
WNBC-DT, WJAR-DT, KTRK-DT, KOCO-DT**

Dear Ms. Dortch,

EchoStar Satellite L.L.C. ("EchoStar") hereby:

- ☐ withdraws its opposition to the digital testing waiver request filed by WNBC-DT, WJAR-DT, and KTRK-DT;¹
- ☐ responds to certain statements in the reply submitted by KOCO-DT, which further corroborates the waiver applicant's failure to meet the statutory standard; and
- ☐ in light of recent press reports, clarifies the statutory test for waiver under the Satellite Home Viewer Extension and Reauthorization Act of 2004

¹ EchoStar's withdrawal is based on commercial reasons and is not an admission that the grounds for waiver were established in each case. In addition, EchoStar reserves the right to oppose the extension of any waiver granted to WNBC-DT, WJAR-DT or KTRK-DT in this proceeding.

("SHVERA"). In brief, if any of the statutory requirements were not met, Congress has plainly required the Commission to deny the waiver. The burden is on the network station requesting a waiver to establish, on "clear and convincing evidence," that its digital signal coverage is limited due to the "unremediable presence" of one or more statutory grounds for waiver.²

I. Withdrawal of Opposition to WNBC-DT, WJAR-DT and KTRK-DT

EchoStar is pleased to report that it has reached an agreement with NBC that moots EchoStar's opposition to the waiver requests of NBC Telemundo License Co. with respect to WNBC-DT and WJAR-DT. Accordingly, EchoStar withdraws its opposition to those waiver requests. EchoStar also withdraws its opposition to the waiver request of KTRK, Inc.

II. Response to KOCO-DT, *Oklahoma City, Oklahoma*

In its reply, Ohio/Oklahoma Hearst-Argyle Television, Inc. ("Hearst") states that "For KOCO-DT to operate at the 56.8 kW of power suggested by EchoStar, Hearst would have to procure a more powerful transmitter. SHVERA does not require such a frivolous and costly purchase."³ In doing so, Hearst essentially admits that the "substantial decrease" in coverage area resulting from its use of side-mounted antennas was not "unremediable," as required by SHVERA.⁴ It could have been remedied with the use of a more powerful transmitter, if only Hearst were willing to spend the money to do so. However, the statute makes clear that "[u]nder no circumstances may [a digital testing waiver] be based upon financial exigency."⁵ Accordingly, KOCO-DT's waiver request must be denied. As Congress has already determined, television viewers that cannot receive KOCO-DT's digital signal over the air should not be denied the opportunity to obtain the distant signal of a station affiliated with the same network just because Hearst is unwilling to make the necessary investment in a more powerful transmitter. The FCC does not have discretion to change a statutory requirement.

² See 47 U.S.C. § 339(a)(2)(D)(viii); EchoStar Opposition at 2-3, *filed in* MB Docket No. 05-317 (filed Dec. 30, 2005).

³ Consolidated Reply of Hearst-Argyle Stations, Inc., Ohio/Oklahoma Hearst-Argyle Television, Inc., WAPT Hearst-Argyle Television, Inc. and WPBF-TV Company to the Opposition of EchoStar Satellite L.L.C., at 5, *filed in* MB Docket No. 05-317 (filed Jan. 17, 2006) ("Hearst Reply").

⁴ 47 U.S.C. § 339(a)(2)(D)(viii).

⁵ 47 U.S.C. § 339(a)(2)(D)(viii).

III. The Commission Must Apply the Statutory Waiver Criteria

Given recent press reports,⁶ we are concerned that the FCC might be misreading the statute and inappropriately shifting the burden from the broadcast licensee to the waiver opponent. *First*, opponents to a waiver request *do not* in fact need to give the Commission a *public interest* reason why the request should be granted. Congress has already performed part of the public interest analysis here, and has concluded that the Commission may *not* grant a waiver if any of the statutory requirements were not met,⁷ without need for a public interest showing by waiver opponents. *Second*, such a statement incorrectly places on the opponent the burden to show why a waiver should not be granted. The statute clearly provides, however, that the burden is in fact on the network station to establish, on “clear and convincing evidence,” that its digital signal coverage is limited due to the “unremediable presence” of one or more statutory grounds for waiver.⁸

One copy of this letter is being filed in this docket via the Commission’s Electronic Comment Filing System. In addition, a copy of this filing is being served on the persons specified in the attached Certificate of Service.

Respectfully submitted,

/s/

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Attachment (Certificate of Service)

⁶ The trade press recently quoted an FCC official as stating: “Where there’s opposition, ‘we’ll certainly look at it,’ he said, adding: ‘You have to give us a public interest reason why the waivers shouldn’t be granted.’” Jonathan Make, *DBS, Broadcasters Square Off on DTV Tests; FCC Sees Action Soon*, COMM. DAILY, Jan. 11, 2006, at 7.

⁷ 47 U.S.C. § 339(a)(2)(D)(viii) (“The Commission *may only* grant such a request upon submission of clear and convincing evidence that the station’s digital signal coverage is limited due to the unremediable presence of one or more of the following”) (emphasis added).

⁸ 47 U.S.C. § 339(a)(2)(D)(viii). This is acknowledged in reply comments filed by the licensee of KOCO-DT. *See, e.g.*, Hearst Reply at 4 (“there is no presumptive right to obtain a waiver . . .”).

CERTIFICATE OF SERVICE

I, Desiree Grant, hereby certify that on February 17, 2006, I caused a true copy of the foregoing to be served by first-class mail (or by electronic mail where indicated by *) upon the following:

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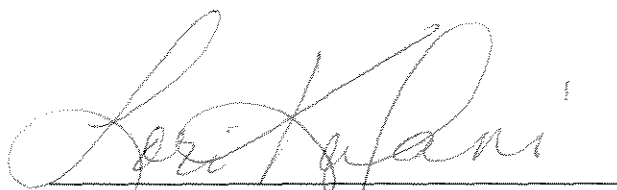
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